Malaysia Plastics Sdn Bhd v United Overseas Bank (M) Bhd and another suit

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS D-22 NCC-1467 OF 2010 AND D-22NCC-1579 OF 2010
NALLINI PATHMANATHAN J
26 MARCH 2012

Banking — Banker and customer — Forgery — Customers sued banks for honouring forged cheques and letters of instruction for telegraphic transfers ('documents') — Banks verified documents with customers' accounts executive before paying — Executive regularly verified cheques with banks though not expressly authorised to do so — Whether customers' conduct represented executive as having authority — Whether customers contributed to forgery — Whether banks had defence under ss 24 and 73A of the Bills of Exchange Act 1949

The liability of two banks for honouring and paying out monies from their respective customer's current account when presented with forged cheques and forged letters of instruction ('LOIs') for telegraphic transfers ('the impugned documents') was the subject matter of the two instant suits jointly heard by the High Court. The first suit, brought by Malaysia Plastics Sdn Bhd ('MPSB') against United Overseas Bank (M) Bhd involved eight forged cheques for a total sum of RM1,608,000. The other suit, brought jointly by MPSB and another company, Manhattan Marketing Sdn Bhd, against Malayan Banking Berhad, involved 37 forged cheques and three forged LOIs for telegraphic transfers involving a total sum of RM4,269,228.96. Both suits had common factors: (i) the authorised signatories for the impugned documents were two directors of the plaintiff companies, Christina Ang and Ivan Ang, whose signatures had been forged (ii) an executive in the accounts division of the plaintiffs, Tan Mei Wan ('TMW'), was entrusted with possession and control over the plaintiffs' cheque books, bank statements and the operation of their banking transactions and was often the person the banks called to verify on the valid issuance of the plaintiffs' cheques, and (iii) Christina Ang was at all times aware the banks had regularly called TMW to verify cheques and had allowed the practice to continue without hindrance and without any checks on or monitoring of TMW's activities. The plaintiffs sued the respective banks for loss suffered as a result of the latter honouring and paying out on the impugned documents. The plaintiffs said the banks were liable for not verifying the impugned documents with the authorised signatories themselves and should not have been satisfied with obtaining TMW's confirmation alone as the plaintiffs had never formally notified the banks that TMW was authorised to verify cheques or LOIs on their behalf. In their defence, the banks said that when their officers called the plaintiffs' offices to speak to the authorised

signatories they were instead put through to TMW who verified the impugned documents. The banks argued that the plaintiffs by their conduct were estopped by s 24 of the Bills of Exchange Act 1949 ('the Act') from asserting that TMW was not authorised to verify the impugned documents because on numerous occasions in the past TMW had given such verifications without problems or objections from the plaintiffs. Christina Ang was also aware of that practice and had allowed it to go on. The banks also invoked s 73A of the Act to argue that as the plaintiffs by their conduct had knowingly or negligently contributed to the forgery, the impugned documents were deemed to be validly signed. This, coupled with the fact the banks had acted in good faith in honouring the impugned documents, afforded the banks a complete defence.

Held, dismissing the claims:

(1) The plaintiffs had proved on a balance of probabilities that the signatures on the cheques and LOIs had been forged (see para 37).

(2) A defence of estoppel under the second limb of s 24 of the Act did not operate to alleviate the liability of the banks for paying out on the forged cheques and the LOIs. For the estoppel in s 24 to arise, there had to be clear and direct representation from the plaintiffs to the banks to the effect that the impugned documents were good to be honoured. The plaintiffs did not expressly authorise the banks to deal with TMW on the verification of the cheques (see para 75).

(3) Conduct from which an inference of authorisation was drawn by the banks without any positive or direct representation from the plaintiffs did not have the key characteristic of an estoppel. If the 'representation' that TMW was authorised to verify cheques on the plaintiffs' behalf had to be inferred from the plaintiffs' conduct, that was not 'direct representation' by the plaintiffs that was communicated directly to the banks (see paras 71–72).

(4) The plaintiffs had facilitated the forgery by, inter alia, allowing TMW full custody and control of all their accounts documentation. This, together with a failure to check, audit or supervise the cheque books and bank statements, contributed directly to the forgery. Finally, the indirect authorisation of TMW in verifying the company's cheques comprised a combination of factors that fell within the purview of negligent contribution to the forgery as envisaged by s 73A (see paras 76 & 86).

(5) There was no evidence the banks were complicit with the perpetrators of the forgery or that they had failed to act in good faith (see para 91).

[Bahasa Malaysia summary

Liabiliti dua bank kerana melunas dan membayar wang kepada akaun semasa pelanggan mereka apabila dikemukakan cek-cek palsu dan surat-surat arahan

palsu ('SAP') untuk pindahan telegrafik ('dokumen yang dipersoalkan') adalah perkara pokok dua guaman tersebut yang didengar bersama oleh Mahkamah Tinggi. Guaman pertama, dimulakan oleh Malaysia Plastics Sdn Bhd ('MPSB') terhadap United Overseas Bank (M) Bhd melibatkan lapan cek palsu yang keseluruhan berjumlah RM1,608,000. Guaman lain, yang dimulakan bersama oleh MPSB dan satu lagi syarikat, Manhattan Marketing Sdn Bhd, terhadap Malayan Banking Bhd, melibatkan 37 cek palsu dan tiga SAP untuk pindahan telegrafik yang keseluruhan berjumlah RM4,269,228.96. Kedua-dua guaman tersebut mempunyai faktor-faktor sama: (i) penandatangan yang diberi kuasa untuk dokumen yang dipersoalkan adalah dua pengarah syarikat plaintif-plaintif, Christina Ang dan Ivan Ang, yang mana tandatangan mereka telah dipalsukan; (ii) eksekutif di bahagian akaun plaintif-plaintif, Tan Mei Wan ('TMW'), telah diamanahkan dengan milikan dan kawalan ke atas buku-buku cek, penyata bank plaintif-plaintif dan operasi transaksi perbankan mereka dan merekalah yang sering dipanggil oleh bank-bank untuk mengesahkan keluaran sah cek-cek plaintif-plaintif; dan (iii) Christina Ang adalah pada setiap masa matan mengetahui bahawa bank-bank tersebut seringkali memanggil TMW untuk mengesahkan cek-cek dan telah membenarkan amalan tersebut berterusan tanpa halangan dan tanpa apa-apa semakan ke atas atau memantau aktiviti TMW. Plaintif-plaintif telah menyaman bank-bank tersebut untuk kerugian yang dialami akibat bank-bank melunas dan membayar untuk dokumen-dokumen tersebut. Plaintif-plaintif menyatakan bank-bank tersebut bertanggungjawab kerana tidak mengesahkan sendiri dokumen-dokumen yang dipersoalkan dengan penandatangan yang diberi kuasa dan tidak patut dipenuhi dengan mendapat pengesahan TMW sahaja kerana plaintif-plaintif tidak pernah secara rasmi memaklumkan bank-bank bahawa TMW tidak diberi kuasa untuk mengesahkan cek-cek atau SAP bagi pihak mereka. Dalam pembelaan mereka, bank-bank mengatakan bahawa apabila pegawai-pegawai mereka memanggil pejabat-pejabat plaintif-plaintif untuk bercakap dengan penandatangan yang diberi kuasa panggilan mereka sebaliknya diserahkan kepada TMW yang mengesahkan dokumen-dokumen yang dipersoalkan tersebut. Bank-bank tersebut berhujah bahawa plaintif-plaintif melalui perlakuan mereka telah diestopkan oleh s 24 Akta Pertukaran Bil 1949 ('Akta tersebut') daripada menegaskan bahawa TMW tidak diberi kuasa untuk mengesahkan dokumen-dokumen yang dipersoalkan kerana pada beberapa kejadian lampau TMW telah memberikan pengesahan sedemikian tanpa apa-apa masalah atau bantahan daripada plaintif-plaintif. Christina Ang juga mengetahui tentang amalan tersebut dan telah membenarkannya untuk diteruskan. Bank-bank tersebut juga telah menggunakan s 73A Akta tersebut untuk berhujah bahawa oleh kerana plaintif-plaintif melalui perlakuan mereka dengan pengetahuan atau cuai telah menyumbang kepada pemalsuan tersebut, dokumen-dokumen yang dipersoalkan dianggap telah ditandatangani secara sah. Ini, bersama fakta bank-bank telah bertindak dengan niat baik kerana melunaskan

dokumen-dokumen yang dipersoalkan tersebut, memberikan bank-bank tersebut pembelaan yang sewajarnya.

Diputuskan, menolak tuntutan-tuntutan:

(1) Plaintif-plaintif telah membuktikan atas imbangan kebarangkalian bahawa tandatangan-tandatangan atas cek-cek dan SAP tersebut telah dipalsukan (lihat perenggan 37).

(2) Pembelaan estopel di bawah cabang kedua s 24 Akta tersebut tidak beroperasi untuk meringankan liabiliti bank-bank untuk membayar cek-cek dan SAP yang dipalsukan. Untuk estopel dalam s 24 timbul, perlu ada representasi jelas dan telus daripada plaintif-plaintif kepada bank-bank untuk menyebabkan dokumen-dokumen yang dipersoalkan adalah baik dan dilunaskan. Plaintif-plaintif tidak memberi kuasa dengan jelas untuk bank-bank berurusan dengan TMW berhubung pengesahan cek-cek tersebut (lihat perenggan 75).

(3) Pelakuan berdasarkan inferens pemberian kuasa dibuat oleh bank-bank tanpa apa-apa representasi positif atau secara langsung daripada plaintif-plaintif tidak mempunyai ciri-ciri utama estopel. Jika representasi bahawa TMW diberi kuasa untuk mengesahkan cek-cek bagi pihak plaintif-plaintif telah pun dibuat inferens daripada pelakuan plaintif-plaintif maka itu bukan representasi secara langsung oleh plaintif-plaintif yang telah dimaklumkan secara langsung kepada bank-bank tersebut (lihat perenggan 71–72).

(4) Plaintif-plaintif telah memudahkan pemalsuan itu, antara lain, dengan membenarkan TMW mempunyai jagaan dan kawalan penuh ke atas semua dokumentasi akaun mereka. Ini, beserta kegagalan untuk menyemak, mengaudit atau menyelia buku-buku cek dan penyata-penyata akaun, telah menyumbang secara langsung kepada pemalsuan tersebut. Akhirnya, pemberian kuasa secara tidak langsung kepada TMW untuk mengesahkan cek-cek syarikat yang mengandungi gabungan pelbagai faktor yang terjatuh di bawah skop sumbangan kecuaian sebagaimana termaktub dalam s 73A (lihat perenggan 76 & 86).

(5) Tiada keterangan bank-bank tersebut bersubahat dengan pelaku-pelaku pemalsuan atau bahawa mereka telah gagal bertindak dengan niat baik (lihat perenggan 91).]

Notes

For cases on forgery, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2148–2156.

Cases referred to

Brown v Westminster Bank Ltd [1964] 2 Lloyd's Rep 187 (refd)

Ch'ng Kheng Phong v Chung Keng Huat & 2 Ors [2011] 8 MLJ 32; [2010] 1 LNS 1155, HC (refd)

Dr Shanmugamnathan v Periasamy s/o Sithambaram Pilial [1997] 3 MLJ 61, FC (refd)

Globelink Container Line (M) Sdn Bhd v Bumiputra Commerce Bank Bhd [2011] MLJU 400; [2011] 1 LNS 414, HC (refd)

Greenwood v Martins Bank Ltd [1933] AC 51, HL (refd)

Kepitigalla Rubber Estate Ltd v National Bank of India Ltd [1909] 2 KB 1010 (refd)

Leolaris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd [2009] MLJU 854; [2009] 10 CLJ 234, HC (refd)

Leolaris (M) Sdn Bhd v RHB Bank Bhd [2009] MLJU 568; [2009] 10 CLJ 248, HC (refd)

London Joint Stock Bank Ltd v Macmillan [1918] AC 777, HL (refd)

Marfani & Co Ltd v Midland Bank Ltd [1968] 2 All ER 573, CA (refd)

Melewar Apex Sdn Bhd v Malayan Banking Bhd [2007] 3 MLJ 687; [2007] 8 CLJ 579, HC (refd)

National Australia Bank Ltd v Hokit Pty Ltd (1996) 39 NSWLR 377 (refd)

National Bank of New Zealand Ltd v Walpole and Patterson Ltd [1975] 2 NZLR 7 (refd)

Prima Nova Sdn Bhd v Affin Bank Bhd [2009] MLJU 1130; [2010] 9 CLJ 75, HC (refd)

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] 1 AC 80, PC (refd)

Tai Hing Ltd v Liu Chong Hing Bank Ltd [1986] 1 AC 80, PC (refd)

Tina Motors Pty Ltd v Australian & New Zealand Banking Group Ltd [1977] VR 205 (refd)

Trolli Master Sdn Bhd v RHB Bank Bhd [2011] 7 CLJ 105, HC (refd)

United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182; [1993] 2 CLJ 31, SC (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 24, 73A, 82
Evidence Act 1950 s 45

Gregory Ling (Jamie Wong with him) (Ranjit Singh & Yeoh) for the plaintiff.
Shanti Morgan (SY Liew with her) (Shearn Delamore & Co) for the defendant.
Hairul Azzam (Dazz RK Narayanan with him) (Azam Lim & Pang) for the defendant (Malayan Banking Bhd).

Nallini Pathmanathan J:

INTRODUCTION

[1] The plaintiff in this case, Malaysia Plastic Sdn Bhd ('customer') was a customer of the defendant, United Overseas Bank (Malaysia) Bhd ('the bank') and maintained with it, several accounts. It has brought this suit against the bank in relation to eight cheques amounting to RM1,608,000 ('disputed cheques') which the customer has alleged were wrongfully and without authority paid out from the customer's current account with the bank.

[2] The bank had, both prior to and after the issuance of these eight cheques, honoured by payment on presentation, several tens of cheques, totaling several hundred thousand ringgit. The majority of these cheques were legitimate or valid cheques that were correctly paid out by the bank. However a problem arose in respect of the eight cheques above, which on their face appeared to have been drawn by the customer and to bear the signatures of one Christina Ang and Ivan Ang, the customer's directors, who were the authorised signatories to its cheques. The bank in each of these eight instances, debited the company's current account with the amount of the cheque. These cheques, however, the plaintiff maintains, were not the customer's cheques. They were forgeries. On each the signature of Christina Ang and Ivan Ang are alleged to have been forged by an accounts clerk/manager employed by the customer, one Tan Mei Wan (TMW). The bank disputes that these eight cheques were in fact forged.

[3] The net result is that the customer complains that the bank paid out on these eight 'forged' cheques without its valid mandate and accordingly seeks recompense. The bank in turn denies that the cheques were forged and further maintains that the customer is precluded, by its conduct, from setting up the forgery or want of authority. The bank also relies on s 73A of the Bills of Exchange Act 1949 to maintain that the authorised signatories negligently contributed to the forgery, or making of the unauthorised signature, as a consequence of which, under s 73A, the signature is deemed to be that of the authorised signatories. The central issue in this case therefore is upon whom the loss arising from Tan Mei Wan's forgeries (if forgery is established) is to fall, the customer or the bank.

BACKGROUND FACTS

[4] The customer had initially opened its current account with the then Overseas Union Bank Ltd ('OUB') on 23 November 1970. On 7 October 1993, the customer passed a directors' resolution to amend its mandate to four

authorised signatories ie: (1) Ang Guan Seng (2) Ang Pon Beng (3) Wong Aun Phui and (4) Christina Ang in respect of its bank accounts with various banks including OUB. A

[5] OUB then merged with the bank in April 2002, and consequentially, the customer's current account became the bank's current account with the Account No 381-3-000189-4 ('current account'). B

[6] On 2 March 2007, one Tan Mei Wan ('TMW') was employed by the customer as an accounts executive. Her job specification and duties were listed in her letter of appointment and her duties encompassed the overseeing of accounts in the customer company and also one LGP Optoelectronics Sdn Bhd ('LGP'). TMW very quickly gained the trust of the customer and took on all the responsibilities relating to the management of its accounts. She was authorised by the customer to give instructions in relation to money market transactions and foreign exchange transactions for the customer's foreign currency account with the bank. The extent of her responsibilities included the management and possession of the customer's cheque books and the operation of its banking transactions. She also maintained the customer's bank statements and statements of accounts. It is not in dispute that TMW undertook in essence the entirety of the customer's banking transactions and accounts function. C D E

[7] On 12 November 2007, the customer issued a letter to the bank authorising Christina Ang and TMW to give written or oral instructions in relation to the customer's other account with the bank which is the Foreign Currency Account No: 381–03301–1-00 ('FC account'). The current claim relating to the eight cheques is not related to this foreign currency account. F

[8] On 9 January 2009, LGP wrote a letter authorising Christina Ang, Wong Sai Kit and TMW in relation to LGP's Foreign Currency Account No 381–034220-USD. G

[9] Following the death of Ang Guan Seng on 19 October 2008 (one of the authorised signatories), the customer passed a directors' circular resolution on 16 January 2009 to amend its mandate from four authorised signatories to three. This included one Ivan Ang as a signatory (in place of Ang Guan Seng) in respect of the customer's several bank accounts with various banks including the bank's current account. On 19 May 2009, an excerpt of this directors' circular resolution was prepared and passed to the bank and a new customer specimen signature card was submitted by the customer to the bank to provide Ivan Ang's sample signature. H I

[10] Between 9 December 2009 and 2 February 2010, eight disputed

cheques were paid out of customer's current account. It is pertinent that apart from these eight disputed cheques several tens of other valid cheques were issued and validly paid out. The details of the eight disputed cheques are tabulated as below:

No	Cheque Date	Cheque Bank in Date	Cheque No	Payee	Amount (RM)	Signatories
1.	08.12.2009	09.12.2009	219930	Kuan Teck Yap	150,000.00	Christina Ang Ivan Ang
2.	05.01.2010	06.01.2010	219938	Kuan Teck Yap	280,000.00	Christina Ang Ivan Ang
3.	10.01.2010	13.01.2010	219944	Aliah Fadzilah	78,000.00	Christina Ang Ivan Ang
4.	12.01.2010	14.01.2010	219943	Kuan Teck Yap	300,000.00	Christina Ang Ivan Ang
5.	18.01.2010	20.01.2010	260425	Aliah Fadzilah	145,000.00	Christina Ang Ivan Ang
6.	22.01.2010	26.01.2010	260423	Kuan Teck Yap	220,000.00	Christina Ang Ivan Ang
7.	22.01.2010	26.01.2010	260423	Kuan Teck Yap	220,000.00	Christina Ang Ivan Ang
8.	28.01.2010	02.02.2010	347451	Aliah Fadzilah	250,000.00	Christina Ang Ivan Ang
9.	02.02.2010	08.02.2010	347454	Kuan Teck Yap	185,000.00	Christina Ang Ivan Ang
TOTAL					RM1,608,000.00	

[11] Notwithstanding the change in signatories being duly notified to the bank, this salient information was not updated in the bank's central information centre, although the bank's branch office did so. All cheques beyond a certain value are cleared at the bank's channel operations centre. As no updating of the new signatory, namely Ivan Ang had been recorded in the bank's central information system, all eight cheques were referred by the bank's channel operations centre to the branch to check the signature against the actual specimen signature card.

[12] As a consequence with respect to each of the cheques which were issued

between 8 December 2009 and 2 February 2010, a verification exercise was carried out by the bank. In each of the eight instances, an employee of the bank called the customer's office to ascertain whether the cheques had been validly issued and could therefore be honoured. Several different employees of the bank testified that they had called the customer's office in respect of this verification exercise. The details of these verification calls is as set out below:

Cheque No	Officer for the bank
219930	Siti Salwa
219943	DW13
219944	DW13
260423	DW13
260425	DW13
347451	DW13
219928	DW18

[13] The dispute in this case centres around the sequence of events that transpired when such calls were made. In summary the customer maintains that no effort was made to attempt verification with either of the authorised signatories in respect of these eight cheques. The bank on the other hand maintains that upon calling the customer's office, and asking for one of the authorised signatories, they were promptly put through to the said TMW, who claimed to be authorised to verify these cheques on behalf of the customer. In this context, TMW also verified the several tens of cheques that were in fact validly issued.

[14] DW13, Atikah Ansari bt Mohamad ('DW13') who was responsible for most of the verification checks and calls testified that her first step was to check the signatures appearing on the face of the cheque image against the signatures on the specimen signature cards held at the branch as well as that uploaded into the system. She was satisfied that the signatures were the same. She then called the customer's general line obtained from the bank's data system and asked, according to her, to speak to the authorised signatories of the cheques. Siti Rokiah, TMW's assistant/receptionist would answer the call. DW13 testified that on each occasion she was directed to TMW notwithstanding that she had asked for the authorised signatory. TMW would confirm that the cheque was in order.

[15] DW13 would provide TMW the cheque number whereupon TMW would confirm the payee, the authorised signatories and the amount. In this manner five of the eight cheques were confirmed with DW13 as being in order. Evidence that these calls were in fact made is borne out by documents produced by the bank. These documents contain the telephone number called, the time of the call as well as the identity of the person who had confirmed the cheque.

A notation indicating that the cheque was ok and the words 'c/w Ms Tan' meant the cheque number had been confirmed with TMW.

[16] It is in dispute whether the bank's employees sought to speak, at the outset, with the authorised signatory, prior to being put through to TMW. However DW13's evidence as well as DW18's evidence was to that effect, namely that they had first sought to speak to one of the authorised signatories but had been put through to TMW who confirmed the cheques. In any event these eight cheques were paid out on the basis of the verification by TMW, purportedly on behalf of the authorised signatories. In this context it is relevant that at the heart of the plaintiff's claim is the assertion that TMW was not the authorised representative or signatory to confirm the cheques and that such authorisation should only have been procured from either Christina Ang or Ivan Ang. The bank on the contrary however, maintains that the plaintiff is precluded from asserting that TMW was not authorised to confirm the subject cheques because:

(a) Christina Ang testified that she had no issue with TM speaking to UOB giving the necessary confirmations;

(b) Christina Ang was aware prior to this claim that the bank was seeking verification of cheques from TMW in 2007, 2008 and 2009;

(c) this conduct it is maintained amounts to authorising TMW to verify the customer's cheques with the bank; and

(d) TMW was authorised expressly in respect of another of the customer's account as well as that of an associate company namely LGP.

[17] In this manner TMW verified the eight disputed cheques. Matters however came to a head when the alleged forgery was discovered on 10 February 2010 at about 4pm, when Christina Ang received a call from one of the bank's officers, Atikah Ansari bt Mohamed ('Atikah'). Atikah had decided to 'reconfirm' the validity of the eighth forged cheque at about 4pm on the same day. On this occasion, she was put through to Christina Ang as TMW was on leave. It was at this point that the authorised signatory, Christina Ang, discovered that she had not authorised any such cheque. Accordingly, verbal instructions were given to take all necessary steps to stop payment on that cheque and all cheques issue from that account. She asked the bank to freeze the current account. Vide two letters dated 10 February 2010, the customer instructed the bank to, inter alia, fax monthly statements and cancel the cheque book with series beginning with 347451, and to cancel the cheque book with series beginning with 347451. The customer further instructed the bank to freeze all its accounts and not allow TMW to verify any transaction. It also sought details on eight suspected non-authorised cheque payments.

[18] Several police reports were duly lodged upon discovery of these and other cheque forgeries. A

[19] Subsequently the customer wrote to the bank on 8 March 2010 asking whether the bank had received any authorisation in writing from it for TMW to act as liaison cheque verification personnel. The bank responded vide letter dated 22 March 2010 confirming that it had not received any instructions in writing authorising TMW to act as a representative to verify cheques on the customer's account. B

THE CLAIM C

[20] The plaintiff claims that signatures on the disputed cheques which were all allegedly signed by Christina Ang and Ivan Ang are forged. As such the bank had no mandate to honour the disputed cheques and debit the customer's current account. The customer's funds were, it is contended, therefore converted to the bank's own use as a consequence of which the customer is deprived of the same. Further and/or alternatively it is contended that the bank was negligent in that it breached the duty of care owed to the customer and breached its contractual duty to its customer. Ultimately it seeks recovery of the sum of RM1,608,000, damages and interest from the bank. D E

THE DEFENCE

[21] The bank in its defence maintains that it should not be responsible for any loss or damage allegedly suffered by the customer. It's defence stipulates that: F

(a) the signatures on the subject cheques were not forged;

(b) in the event that the signatures on the subject cheques were forged, it is contended that the customer failed to take reasonable steps to prevent the fraud/forgery and had in fact conducted itself in a manner which contributed to the perpetration of fraud/forgery; breached its duty to UOB in failing to take reasonable steps to prevent fraud/forgery; and G H

(c) the bank also maintained that it had only paid out on the disputed cheques after having made verification with the plaintiff whereupon s 24 of the Bills of Exchange Act 1949 raised an estoppel against the customer from relying on the alleged forgery. Additionally the bank also relies on s 73A of the Bills of Exchange Act 1949 of the which provides a statutory defence to it where the customer negligently contributed to the forgery. That it is contended is the case here; I

(d) the bank also maintains that it carried out the transactions requested by the customer in good faith and without negligence, and the examination

and/or scrutiny conducted by the bank in carrying out those transactions are good, proper and/or reasonable and/or normal in the banking industry and/or in the ordinary course of the bank's business; and

(e) finally it is contended that the customer did not abide by the rules governing current accounts enforced from time to time and therefore was in breach of the same, including the failure to inform UOB of irregularities in its statement of accounts within 30 days.

THE TRIAL

[22] The trial of this suit was heard together with the trial of another suit brought by the customer and another customer, Manhattan Marketing Sdn Bhd against a second bank, namely Malayan Banking Bhd ('Maybank') vide Kuala Lumpur High Court Civil Suit No D-22NCC-1579 of 2010 ('the Maybank suit').

[23] The trial of both suits proceeded over a period of five days and ten witnesses were called in respect of the suit against the bank:

(a) PW1 — Ang Ping Ping or Christina Ang ('Christina');

(b) PW2 — Ang Se Ghee or Ivan Ang ('Ivan');

(c) PW3 — Inspector Rafi bin Arifai;

(d) PW4 — Lim Yok Chaw;

(e) DW13 — Atikah Ansari bt Mohamed;

(f) DW14 — Lee Gek Kwee;

(g) DW15 — Sabariah Abbas;

(h) DW1 — Tan Ah Ng;

(i) DW17 — Suzana bt Selamat; and

(j) DW1 — Chin Fui Li.

[24] Several bundles of documents were filed and marked consecutively as CBD1–9 respectively. Parties had agreed in the course of case management and reaffirmed at the outset of trial that save for the disputed cheques, and the expert reports of the handwriting experts, all documents were to be treated as part B documents, meaning that the maker was dispensed with but the contents remained in dispute. Accordingly not every document was marked

individually as an exhibit.

THE ISSUES

[25] Although each of the parties set out the issues before this court a little differently, the following represents a fair restatement or summary of the issues to be adjudicated upon:

(a) were the signatures on the eight disputed cheques forged?;

(b) if the cheques were in fact forged, on the facts of this case, is the second limb of s 24 of the Bills of Exchange Act 1949 operative, such that the plaintiff is precluded from setting up the forgery or want of authority?; and

(c) if the cheques were in fact forged, on the facts of this case, does s 73A of the Bills of Exchange Act 1949 operate to afford a defence to the bank? In other words, can it be said that the customer knowingly or negligently contributed to the forgery or the unauthorised signature such that it operates and is deemed to be the signature of the person it purports to be in favour of the bank who in good faith pays the cheque?

FIRST ISSUE: WERE THE SIGNATURES ON THE EIGHT DISPUTED CHEQUES FORGED?

[26] This issue is a question of fact to be determined by the court based on the evidence adduced. The burden here is on the customer to prove that the signatures on all eight disputed cheques were forged or unauthorised. The standard is that of a balance of probabilities. In summary therefore the burden of proof of the forgery lies on the customer alleging the forgery, on a balance of probabilities

[27] All the eight disputed cheques were purportedly signed by Christina Ang (PW1) and Ivan Ang (PW2). Both signatories testified that they did not sign the disputed cheques and testified that their signatures had been forged. Their evidence was clear in each instance that the signatures on those eight disputed cheques were not their signatures. Their evidence is to be read in detail from the records of the notes of proceedings and compared with the impugned signatures in order to understand their testimony as to why they disputed that the signatures were theirs. I do not propose to reproduce the minutiae of the same here. In the course of cross-examination while it was not directly put to these witnesses that they had signed or executed the 'forged' cheques, it was suggested to Christina Ang that she had authorised or been complicit in the issuance of some cheques other than the eight disputed cheques which the

bank's handwriting expert had opined contained signatures that were similar to, or of the same authorship as the eight disputed cheques. Christina Ang denied this wholly and maintained that she had not signed either the disputed cheques or these other cheques. It was further suggested that as the customer had not made claim for the recovery of monies paid out under these other three cheques, and those three cheques were made out to a company in which Christina Ang's husband was a major shareholder, Christina Ang was in some manner responsible for or had collaborated in this entire fraud directly. This was rigorously denied. It appeared to this court that there was insufficient evidential basis to suggest that Christina Ang was in any way involved in the fraud/forgery. The fact that no claim was made in this suit in respect of three cheques made out to an entity related to Christina Ang's husband, and which contained signatures which were similar to the signatures or of the same authorship as those on the eight disputed cheques, does not in itself warrant an inference that Christina Ang was in any way involved directly in the forgery of the eight disputed cheques. It certainly does not make Christina Ang the author of the signatures on the eight disputed cheques. I found both witnesses, namely Christina and Ivan Ang to be credible witnesses of truth.

THE EVIDENCE OF THE HANDWRITING EXPERTS

[28] Apart from Christina Ang and Ivan Ang who testified that they had not signed any of the eight disputed cheques, handwriting experts were engaged by both parties to render their respective opinions on the signatures. The customer engaged one Mr Lim Yok Chaw, PW4 ('the customer's expert') and UOB engaged one Ms Lee Gek Kwee, DW14 ('the bank's expert'). It is evident upon a reading of their respective curriculum vitae that they are both qualified, experienced and have testified in court before.

[29] I accept and adopt the submission of learned counsel for the plaintiffs that s 45 of the Evidence Act 1950 stipulates that when the court has to form an opinion based on the identity or genuineness of handwriting (in this case, signatures), opinions of experts in that area are relevant facts in forming an opinion. However, being opinion evidence, such evidence can never be conclusive and serves primarily to assist the court (see *Dr Shanmugamnathan v Periasamy s/o Sithambaram Pilial* [1997] 3 MLJ 61; *Ch'ng Kheng Phong v Chung Keng Huat & 2 Ors* [2011] 8 MLJ 32; [2010] 1 LNS 1155.

[30] Based on the customer's expert, ie Lim's report called the 'signature verification report' and his testimony in court, it was his opinion that *the alleged signatures on the disputed cheques were of different authorship from the specimen signatures of Christina Ang (PW1) and Ivan Ang (PW2).* He testified that seven of the eight disputed cheques were traced forgeries and the reason for this was: '… the detection of the presence of indentation lines which ran parallel with or

in close proximity of the inked strokes of the disputed signatures' This was his finding in respect of both signatories' signatures. However he could not make this conclusion for the last of the eight disputed signatures as he only had a photocopy of the cheque, rather than the original. A perusal of PW4's evidence discloses that he undertook a meticulous and detailed examination of the eight disputed signatures which he compared with specimen signatures provided by Christina Ang and Ivan Ang. The details of his findings are set out in his report and it is evident from the same that he conclusively concludes that the author of the eight disputed cheques was not the same as the author of the specimen signatures because, inter alia, the disputed signatures were written in a slow, cautious and unnatural manner, with poor line quality. Indentations were detected running parallel or in close proximity to inked strokes or at the end of inked strokes. With respect to Ivan Ang's signature on the disputed cheques, he opined that they were also written in a slow and unnatural manner, the strokes were not smooth and tremors were detected showing that there was no fluency. Again indentations were detected running parallel or in close proximity to the inked strokes or at the end of inked strokes.

[31] Ms Lee Gek Wee, PW14 produced a report called the 'report on forensic examination of signatures'. Ms Lee noted that there were two groups of signatures bearing different characteristics in the specimen signatures she was provided by UOB. With respect to Christina Ang's specimen signatures two groups were identified. The first group exhibited smooth and fluent line quality and consistencies in the formation and relative height and spacing of strokes (first group) while the second group showed the same design but different line quality and fluency from those of the earlier group of signatures. The strokes in this second group had a different slant and were stiff and angular ('second group'). Similarly with respect to the specimen signatures of Ivan Ang, PW2 she testified that they could be separated into two distinct groups. As such it followed that her opinion was that both Christina Ang and Ivan's specimen signatures could be divided into two groups each. Comparing then these two groups of each person's signatures with the disputed signatures, she concluded that:

(a) the line quality, fluency and slant of the vertical strokes in the disputed signatures were different from the first group; (in other words the authors were likely to be different); and

(b) the disputed signatures were 'significantly similar' to the second group; (in other words the authors could be the same).

[32] Following on from these primary findings she testified that:

(a) she was unable to say if the two groups of specimen signatures were made by two different individuals although she noted differences between the two groups of specimen signatures; and

(b) she was of the opinion that it is highly probable that the person who made the second group also made the disputed signatures.

[33] From the foregoing it therefore follows that PW14's evidence to some extent supports the customer's case in that it suggests that the signatures on the disputed cheques differ from the genuine specimen signatures of Christina Ang and Ivan Ang in the first group.

[34] Ms Lee's report does not conclude that Christina Ang and Ivan Ang made the disputed cheques. Instead she concludes that the disputed cheques were made by the same person who made the second group. However she was reluctant to confirm whether or not the first group and second group were made by different authors and not Christina Ang and Ivan Ang alone. During cross-examination when asked which possibility she would have chosen if she was forced to, she opted for the position that it was signed by different authors.

[35] It is relevant that the first group contained the undisputed signatures of Christina Ang and Ivan Ang in the specimen signature cards held by UOB. Ms Lee confirmed in the course of cross-examination that the signatures in the disputed cheques differed from those appearing on the specimen signature cards in her report.

[36] The primary distinction between Mr Lim and Ms Lee was that the former maintained that these were traced forgeries while Ms Lee dismissed this possibility as she felt that the indentations were not closely related to the strokes of the signature.

[37] I have read and considered the evidence of the signatories, namely Christina Ang and Ivan Ang, the evidence of the handwriting experts as stated above, and have undertaken an examination of the disputed and specimen signatures with the naked eye. I have also perused and considered the expert reports filed. Having done so it appears to this court that the customer has managed to prove on a balance of probabilities that the signatures on the eight disputed cheques are indeed forged because:

(a) I accept the evidence of Christina Ang and Ivan Ang that they did not make the signatures on the disputed cheques;

(b) having considered the evidence of the two expert witnesses, I am satisfied that there are areas of commonality in that both do agree that the signatures on the disputed cheques do not match the undisputed original signatures of Christina Ang and Ivan Ang;

(c) Ms Lee's evidence that the authorship of the signatures on the disputed cheques matches the Group 2 signatures does not warrant any inference

or finding that this comprises the signature of Christina Ang and Ivan Ang. Indeed her evidence is simply that the disputed signatures match that in Group 2. But it is uncertain who the true authors of the Group 2 signatures are. Her evidence appears to exclude the possibility of authorship by Christina Ang and Ivan Ang on the disputed cheques as they clearly do not match the signatures in Group 1; and

(d) a perusal and comparison of the specimen and disputed cheques with some care, clearly do reveal the indentations pointed out by Mr Lim and do denote signatures that are different.

[38] In all these circumstances I am satisfied that on a balance of probabilities, it is most probable that the signatures of the authorised signatories Christina Ang (PW1) and Ivan Ang (PW2) were forged.

[39] Prior to considering the next two issues that arise for adjudication, namely whether the second part of the first limb of s 24 of the Bills of Exchange Act 1949 relating to estoppel or s 73A of the same Act are operative on the facts of this case, it is necessary to consider the position in law in relation to forged cheques and the statutory defences available under ss 24 and 73A.

THE LAW

[40] The general position in law regarding to forgery of cheques has been comprehensively set out by learned counsel for the plaintiff, Mr Gregory Ling and I adopt his submissions here. He relies on an excerpt from a well recognised author on banking law namely Poh Chu Chai, *Banking Law* (2nd Ed), at p 721:

> When a bank makes payment on a customer's cheque, it does so on the customer's mandate. The mandate is signified by the customer's signature on the cheque. When a customer's signature on a cheque is forged, the instrument is inoperative and a bank has no authority to make payment based on the forged signature. A customer has a prima facie claim against a bank if the bank makes payment on a forged instrument.

[41] Following from this therefore it is incumbent upon a bank to compensate or reimburse its customer if it makes payment on a forged instrument. What then, if any, duties are owed by the customer to the bank? In other words is there any duty of care owed by the customer to his bank in the operation of a current account? This issue is comprehensively discussed in the leading decision of the Privy Council in *Tai Hing Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80 which was adopted by the Malaysian courts in *United Asian Bank v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182; [1993]

2 CLJ 31. In the Privy Council decision, Lord Scarman considered the common law position. His Lordship framed the question thus:

> … the question is whether English law recognises today any duty of care owed by the customer to his bank in the operation of a current account beyond, first a duty to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery, and secondly a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it. The first duty was clearly enunciated by the House of Lords in *London Joint Stock Bank Ltd v Macmillan* [1918] AC 777, and the second was laid down, also by the House of Lords, in *Greenwood v Martins Bank Ltd* [1933] AC 51.

And further on in the judgment set out the test in the *Macmillan* case thus:

> … The House held that the customer owes his bank a duty in drawing a cheque to take reasonable and ordinary precautions against forgery.
>
> 'The duty … is to draw the cheques with reasonable care to prevent forgery, and if, owing to neglect of this duty, forgery takes place, the customer is liable to the bank for the loss': per Lord Finlay LC at p 793.
>
> In so formulating the duty the House excluded as a necessary incident of the banker-customer relationship any wider duty, though of course it is always open to a banker to refuse to do business save upon express terms including such a duty. Lord Finlay LC expressly excluded any such duty saying, at p 795:
>
> > Of course the negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn. It would be no defence to the banker if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without sufficient inquiry as to his character.
>
> And the House approved the judgment of Bray J in *Kepitigalla Rubber Estate Ltd v National Bank of India Ltd* [1909] 2 KB 1010. In that case the judge held that, while it is the duty of a customer in issuing his mandates (ie his cheques) to his bank to take reasonable care not to mislead the bank, there is no duty on the part of the customer to take precautions in the general course of carrying on his business to prevent forgeries on the part of his servants …

[42] In *Tai Hing Ltd v Liu Chong Hing Bank* (above) the Privy Council expressly rejected the banks' contention that there was a duty upon the customer to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented to it for payment. They also rejected the contention that the customer owes a duty to take such steps to check his periodic bank statements as a reasonable customer in his position would take to enable him to notify the bank of any debit items in the account which he had not authorised. In so rejecting any wider duty this is what they said:

> … The argument for the banks is, when analysed, no more than that the obligations of care placed upon banks in the management of a customer's account which the courts have recognised have become with the development of banking business so burdensome that they should be met by a reciprocal increase of responsibility imposed upon the customer: and they cite *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 (Ungoed-Thomas J) and *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 WLR 602 (Brightman J) One can fully understand the comment of Cons JA that the banks must today look for protection. So be it. *They can increase the severity of their terms of business, and they can use their influence, as they have in the past, to seek to persuade the legislature that they should be granted by statute further protection.* But it does not follow that because they may need protection as their business expands the necessary incidents of their relationship with their customer must also change. The business of banking is the business not of the customer but of the bank. They offer a service which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is a risk of the service which it is their business to offer. The limits set to the risk in the *Macmillan* [1918] AC 777 and Greenwood [1933] AC 51 cases can be seen to be plainly necessary incidents of the relationship. Offered such a service, a customer must obviously take care in the way he draws his cheque, and must obviously warn his bank as soon as he knows that a forger is operating the account …

[43] Thus the Privy Council outlined the relatively narrow scope of the duty of care owed by a customer to his bank, namely to exercise care in the way in which a cheque is drawn and secondly to warn his bank as soon as he knows or discovers forgery in relation to the operation of his account. Beyond that, at common law, no further contractual duty may be implied. In rejecting any such implied duty, the Privy Council adopted the rationale of Bray J in *Kepitigalla Rubber Estate Ltd v National Bank of India Ltd* [1909] 2 KB 1010:

> … It amounts to a contention on the part of the bank that its customers impliedly agreed to take precautions in the general course of carrying on their business to prevent forgeries on the part of their servants. Upon what is that based? It cannot be said to be necessary to make the contract effective. It cannot be said to have really been in the mind of the customer, or, indeed, of the bank, when the relationship of banker and customer was created. What is to be the standard of the extent or number of the precautions to be taken? Applying it to his case can it be said to have been in the minds of the directors of the company that they were promising to have the pass-book and the cash-book examined at every board meeting, and to have a sufficient number of board meetings to prevent forgeries, or that the secretary should be supervised or watched by the chairman? If the bank desire that their customers should make these promises they must expressly stipulate that they shall. I am inclined to think that a banker who required such a stipulation would soon lose a number of his customers. The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business

they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible.

[44] The Privy Council went on to conclude that there was no advantage in searching for a liability in tort where the parties were in a contractual relationship, more particularly a commercial one. They did not accept that the parties' mutual obligations in tort could be any greater than those to be found expressly or by necessary implication in their contract. Given that the existence of duties no wider than that set out in the *London Joint Stock Bank Ltd v Macmillan* [1918] AC 777 and *Greenwood v Martins Bank Ltd* [1933] AC 51 cases can be implied into the banking contract in the absence of express terms to that effect, the banks were held not to be able to rely on the law of tort to provide them with any greater protection than that they had contracted for.

[45] As for express contractual terms, the Privy Council held that if the banks wish to impose upon their customers an express obligation to examine their monthly statements and to make them unchallengeable after the expiry of a time limit, these express obligations would have to be brought home to the customer. They would also have to be clear and unambiguous if intended to be binding upon the customer.

[46] Finally it was also held unless the conduct of the customer could be construed as amounting to an implied representation, it could not constitute an estoppel precluding the customer from making claim from the bank. It was held that the essence of estoppel is a representation, express or implied, intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss. In this context it was held that mere silence or inaction was insufficient to amount to a representation unless there was a duty to disclose or act.

[47] It is clear therefore that prima facie upon proof of a cheque having been forged, the liability of the bank arises without question as an absolute liability, unless the customer's relatively narrow duties of failing to exercise due care in the drawing of a cheque or failing to alert the bank of known forgery were to be proved, in which event the bank might avoid liability. Put another way, if an express or implied representation were made by the customer to the effect that the cheque ought to be honoured then this might amount to an estoppel availing the bank of a defence and precluding the customer from recovering the quantum paid out erroneously by the bank. In this context, mere silence or an omission to act cannot amount to such an estoppel. Such then is the position at common law.

[48] The Privy Council's decision in *Tai Hing Cotton Mill Ltd v Liu Chong*

Hing Bank Ltd [1986] 1 AC 80 was adopted and followed by the Supreme Court in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182; [1993] 2 CLJ 31. Anuar bin Dato' Zainal Abidin J in delivering the decision of the court traced the history of the tort of conversion which is the basis for the liability of a bank in making payment on forged instruments of its customer:

> … It is an established principle that the liability of a bank for making payment on forged instruments of its customer is founded on the tort of conversion. That is a tort of strict liability. At common law, the business of a banker was so perilous because of the nature of the tort of conversion that in 1882 it became necessary in England to introduce legislation to safeguard the banking community. The Bills of Exchange Act 1882 of UK finds its parallel in the enactment of the same name in this country passed in 1949 …

[49] Referring to the judgment of Diplock LJ in *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573, the Supreme Court adopted the same:

> …
>
> … A banker's business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks on which the cheques are drawn, to receive payment of them and to credit the amount thereof to his own customer's account, either on receipt of the cheques themselves from the customer, or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker however innocent and careful he might have been would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cuase of action, based historically on assumpsit, for money had and received.
>
> So strict a liability, so absolute a duty, on bankers would have discouraged the development of banking business. It was accordingly progressively mitigated by statute, first by s 82 of the Bills of Exchange Act 1882, then by the Bills of Exchange (Crossed Cheques) Act 1906, and finally by s 4 of the Cheques Act 1967.
>
> Therefore, at common law a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. The common law has been codified in s 24 of the Bills of Exchange Act 1949, which creates a limited exception favour of a banker. …

[50] Having set out the section, more particularly that portion which creates the estoppel, namely: '… unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.'

the court went to explain s 24 as follows:

> Section 24 protects a banker by recourse to the doctrine of estoppel. A customer cannot recover if he has represented to his banker that the forged signature is effective and that the instrument is accordingly good for payment.

after which the Supreme Court went on to consider cases where the banker was just so protected, (see *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187 and *Tina Motors Pty Ltd v Australia & New Zealand Banking Group Ltd* [1977] VR 205). It is evident from a perusal of those cases that in order to comprise an estoppel, a clear representation is required from the customer to the effect that the forged signature is effective and that the instrument is accordingly good for payment. The Supreme Court also affirmed and adopted the Privy Council's reasoning and decision in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80. The position is the same in other commonwealth jurisdictions (see *National Bank of New Zealand Ltd v Walpole and Patterson Ltd* [1975] 2 NZLR 7; *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377). An estoppel in terms of a clear representation from the customer therefore comprises one exception to the common law position that a bank is liable to its customer when it pays out without the customer's mandate.

[51] The final but significant provision of law that has to be considered is s 73A of the Bills of Exchange Act 1949. It provides as follows:

> Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and *that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorized signature,* the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value. (Emphasis added.)

[52] What then is the effect of s 73A? Does it have the effect of altering the common law position? A perusal of s 73A discloses that it provides that despite the effect of s 24 which stipulates that no effective discharge or payment can be made under a bill containing a forged or unauthorised signature save where estoppel comes into play, such a bill may yet be honoured and will in fact be deemed to be the signature of the person whose signature was forged, where that same person contributes to the forgery knowingly or negligently. The section also requires the bank to pay out on the cheque in good faith. Put another way, where the person whose signature is alleged to be forged is found to have knowingly or negligently contributed to the act of forgery, the cheque will be deemed to have been made by him and the bank will not have to make good to that person, any payment made out on that instrument. However the bank should act in good faith.

[53] What is meant by 'negligently contributes to the forgery'? Is it restricted to the narrow common law duties of exercising due care in the drawing of the cheque and advising the bank immediately upon being appraised of any forgery, or does it extend further? It appears to this court that the words 'negligent contribution' to the act of forgery must necessarily extend beyond those two narrow duties. The common law position envisages that a customer is precluded from recovering from the bank monies paid out without a mandate, where the customer has been negligent in the actual transaction, ie the drawing of the cheque or has failed to alert the bank of a forgery/fraud after discovering the same. However s 73A speaks specifically of a 'negligent contribution to forgery' which envisages that someone other than the customer has effected a forgery, and the customer has negligently contributed to that act of forgery. The customer cannot be both the forger and also have negligently contributed to the forgery. The clear construction to be accorded to the words 'negligently contributed to the forgery' requires the customer to have in some manner contributed to the facilitation of the forgery. This is entirely different and separate from the common law duties outlined in *Tai Hing Cotton Mill Ltd*. The section creates by statute two specific instances in which the customer is precluded from making claim from the bank for paying out without a mandate. As such s 73A extends beyond the narrow confines of the first duty of care outlined in *Tai Hing Cotton Mills Ltd v Liu Chong Hing Bank Ltd*.

[54] It therefore follows that s 73A does indeed statutorily alter or amend the position in common law to the extent that it provides a complete defence to any claim for monies from the paying institution or bank under a forged instrument where that same customer knowing that the instrument was forged, contributed to it, or negligently allowed the forgery to be perpetrated. Where prior to this amendment (which came into effect on 1 July 1998) the liability of the bank under common law and s 24 was absolute, save and unless estoppel under s 24 could be established, s 73A provides a clear and complete defence if the bank can prove that the customer was complicit or negligent in facilitating the forgery. Earlier under the *Macmillan* and *Greenwood* tests, the duty of the customer, it will be recalled, was confined narrowly to firstly, a duty to exercise care in drawing a cheque and secondly to inform the bank upon discovery of the forgery. With the advent of s 73A it is evident that a new and complete statutory defence was made available to banks. However the burden remains on the bank to prove such complicity or negligence, (see also *Globelink Container Line (M) Sdn Bhd v Bumiputra Commerce Bank Bhd* [2011] MLJU 400; [2011] 1 LNS 414; and *Melewar Apex Sdn Bhd v Malayan Banking Bhd* [2007] 3 MLJ 687; [2007] 8 CLJ 579).

[55] Section 73A therefore provides a statutory defence to banks which alleviates in two limited circumstances the bankers' wide common law liability as enunciated in *Tai Hing Cotton Mill Ltd* and *UAB v Tai Soon Hing*. Prior to

this amendment, the banks could find no relief against such strict liability unless they were in a position to clearly establish an estoppel on the part of the customer. Such estoppel required a clear representation from the customer that the impugned instrument was good for payment. In such an instance, given the clear representation from the customer, the customer was precluded from seeking to renege on his representation and seeking discharge from the bank for the payment out on the forged instrument.

[56] As matters stand therefore, the common law establishes the strict liability of a bank to make good any payment out on a forged instrument on the basis that there was never any mandate from the customer to warrant good discharge of the same. Section 24 made the first inroad into this broad strict liability position by allowing the bank to disclaim liability where it could establish an estoppel on the part of the customer, which amounted to a representation that the forged instrument was good for payment. Section 73A then provided two further specific instances in which the banks could also seek refuge, as set out above. The statutory effect of the latter part of the first limb of s 24 and s 73A is to carve out specific instances when the liability of the bank on a forged instrument is not absolute.

[57] Given the foregoing position in law, it follows from the finding on the first issue, namely whether the cheques were forged, that the customer has established that the bank paid out on these eight cheques without its mandate. In the absence of such mandate the liability of the bank is absolute unless it can fall within the purview of s 24 or s 73A of the Bills of Exchange Act 1949. These issues are therefore considered next.

THE ISSUES

[58] The salient issues in this case have been set out above.

SECOND ISSUE: ON THE FACTS OF THIS CASE, IS THE SECOND PART OF THE FIRST LIMB OF S 24 OF THE BILLS OF EXCHANGE ACT 1949 OPERATIVE, SUCH THAT THE PLAINTIFF IS PRECLUDED FROM SETTING UP THE FORGERY OR WANT OF AUTHORITY?

[59] Is the customer precluded from making claim from the bank by reason of its representation to the bank that the disputed cheques were good for payment or had to be honoured?

[60] It needs to be ascertained whether on the facts of this case it can be argued that such an estoppel has in fact arisen. The effect of this portion of s 24

has been succinctly set out in the case of *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182; [1993] 2 CLJ 31, where the Supreme Court defined the estoppel as follows:

> Section 24 protects a banker by recourse to the doctrine of estoppel. A customer cannot recover if he has represented to his banker that the forged signature is effective and that the instrument is accordingly good for payment.

[61] The Privy Council also referred to two cases, the first case being *Brown v Westminster Bank Ltd* [1964] 2 Lloyds' 187, where the court held that there was an estoppel in favour of the bank in that the plaintiff, by failing to respond to the inquiries made by the bank's branch manager directly to her, had, by her silence, represented the cheques to be genuine, and was therefore precluded from contending otherwise. In the second case of *Tina Motors Pty Ltd v Australia & New Zealand Banking Group Ltd* [1977] VR 205, the action by the plaintiff failed on the ground that the plaintiff was stopped from claiming the cheques were forged. In that case, the bank had actually on two occasions, doubted the signatures on the cheques presented by the employee. The manager of the bank's branch had telephoned a director of the plaintiff, who told the manager that if the employee was presenting a cheque, the signature was in order and the director had actually given express instructions that the cheques presented by the employee were to be honoured.

[62] It is readily evident that in each of these two cases direct inquiries were made of the customer by the bank and the customer directly responded in each instance, the first with absolute silence where there was a duty or responsibility to disclose, and in the second case by expressly, if mistakenly, instructing the bank to honour the cheques. In each of these cases it can be said that there were direct representations made by the customer to the bank.

[63] Who bears the onus of establishing that such an estoppel is operative in this case? It is the bank that bears the onus of establishing such an estoppel precluding the customer from making claim for the monies paid out under the disputed cheques. This is because it is the bank that contends that the customer has acted in a manner that warrants an inference that the customer represented to the bank that the cheques were good for payment and were to be honoured.

[64] In determining whether an estoppel arises on the specific facts of this case, it is necessary to consider the events and circumstances surrounding the verification exercise carried out by the bank. It will be recalled, as set out in the background facts above that the testimony of several of the bank's witnesses was that they had called the customer's office no less than seven times seeking to speak to the authorised signatory but were put through to TMW instead who verified the cheques. Additionally it will be recalled that TMW as accounts

executive was treated as a trusted employee who retained possession and control of the customer's accounts, statements and cheque books. Christina Ang in the course of her testimony conceded that she was aware that TMW was verifying cheques with the bank on the customer's behalf. She had been so verifying the cheques for part of 2007, 2008 and 2009. This despite the fact that she was not designated an authorised signatory for any account nor was there any formal notification by the customer to the bank that TMW was authorised by it to verify cheques on the customer's behalf.

[65] In essence the bank contends that as Christina Ang, a director of the bank was aware that TMW was verifying cheques on behalf of the customer, and chose to allow TMW to continue to do so, this amounted, by conduct or by way of an implied representation that TMW was so authorised and accordingly the customer was stopped by such conduct or representation from denying TMW's verification. In other words, the bank argues that TMW was authorised by the customer to verify cheques on its behalf, and having so represented to the bank, was precluded from retracting or reneging from such representation when it was discovered that cheques so verified were in fact forged.

[66] The bank contends that by carrying out the verification exercise it received, in effect, a representation from the customer that the cheques were valid and were to be honoured. In other words, by reason of the representation made by the customer to the bank that TMW was authorised to verify the cheques, and based on such verification by TMW, it is contended that the customer is estopped or precluded from claiming that it had not given a mandate to the bank to pay out on those cheques. In support of this contention the bank points to the cases of *Brown v Westminster Bank Ltd* [1964] 2 Lloyds' 187 and *Tina Motors Pty Ltd v Australia & New Zealand Banking Group Ltd* [1977] VR 205) (above) which are instances where the courts held that an estoppel came into play, precluding the customer from making claim against the bank for paying out without a mandate.

[67] The customer, on the other hand, maintains that in the absence of any notification in writing by it to the bank that TMW was authorised to verify cheques on its current account, the bank could not and ought not to have accepted verification from TMW. The customer maintains that the bank could and ought to have insisted on speaking directly to the authorised signatories to ensure that a direct representation emanated from the customer. As such the customer maintains that there is in effect no direct representation from the customer to the bank that the cheques were valid and good to go. Verification afforded by the very person who it is believed perpetrated the forgery is no verification. The failure by the bank to insist on ascertaining or verifying the cheques with an authorised signatory amounts to a breach of its contractual

duties as well as its duty of care. In so far as the authorisation of TMW is concerned, the customer maintains that it at no time authorised fraudulent verification or forgery.

[68] It appears to this court that the central issue that arises for consideration in relation to whether an estoppel arises, is whether there was a direct representation from the customer to the bank to the effect that the forged cheques were good to go, whereupon the customer is precluded from reneging or detracting from such representation, the bank having acted on such representation to its own detriment.

[69] The representation relied upon in this case, as borne out by the evidence, is the fact of TMW being authorised to verify cheques on behalf of the customer as well as TMW's direct statement to the bank orally that the cheques were valid and should be honoured.

[70] It is not seriously in dispute that TMW did advise the bank's employees that the cheques were validly issued and genuine and had to be honoured. However the issue is whether such oral representations were in fact valid and authorised representations to the bank by the customer which the bank was entitled to comply with. In this context it cannot be ignored that in so far as the bank's records were concerned, the authorised signatories were Christina Ang and Ivan Ang. There was nothing in writing or orally communicated to the bank to the effect that TMW was authorised to verify cheques on the customer's behalf. Notwithstanding this the bank chose to accept such verification. Neither did the bank attempt to procure any authorisation in writing in relation to TMW from the customer.

[71] Given the foregoing can it be said that there was a representation to the bank that TMW was authorised to verify the cheques? The bank maintains that by reason of the conduct of the customer's director who left the verification exercise to TMW, such an inference can be implied or drawn. It will be recalled however that in all the cases where an estoppel was, in fact, found to be operative, there was a direct representation from the customer to the bank. In the instant case there was no direct statement or representation from Christina Ang communicated directly to the bank to the effect that TMW was authorised to verify cheques on behalf of the customer. There was no statement albeit oral or in writing to this effect. What then is to be made of the conduct of the customer in allowing TMW to verify all cheques, both valid and fraudulent? Is this not sufficient to amount to a representation (implied by conduct) to the effect that TMW was in fact so authorised?

[72] It appears to this court that in order for an estoppel as statutorily prescribed in s 24 to arise, there must be a clear and direct representation from

the customer to the bank to the effect that the subject cheques were good to honoured. This is the key component of an estoppel. Such a representation must emanate directly from the customer or an authorised representative of the customer, and ought to be communicated directly to the bank. Conduct from which an inference of authorisation is drawn by the bank without any positive or direct representation from the customer does not appear to have the key characteristic of an estoppel. If the 'representation' that TMW is authorised to verify cheques on behalf of the customer is to be inferred from the conduct of the customer, then this cannot be described as a direct representation by the customer that was communicated directly to the bank. If in fact Christina Ang had advised the bank in writing or orally that all verification of cheques was to be carried out by TMW, an estoppel may well have arisen. Equally if the bank's employees had spoken directly to Christina Ang and she had confirmed that TMW's verification was to be accepted and the cheques honoured, this too might well have been sufficient to give rise to an estoppel. However no such factual matrix arises here. The bank's employees at no time insisted on speaking to an authorised signatory. Neither did they attempt at any time to seek confirmation with an authorised signatory on another occasion. Nor was any attempt made to confirm in writing the role of TMW as an authorised signatory, although she was accepted as one by the bank without such confirmation by the customer. In all these circumstances it appears that on the present factual matrix as described an estoppel does not arise, precluding the customer from making claim against the bank for the monies paid out without mandate on the forged cheques.

[73] In reaching the foregoing conclusion I am cognisant of the case of *Leolaris (M) Sdn Bhd v RHB Bank Bhd* [2009] MLJU 568; [2009] 10 CLJ 248, where the court held that it was reasonable for the bank to infer impliedly that the accounts clerk there was the authorised representative in relation to banking matters. However in that case the employee's name was expressly set out in the specimen card as the contact person. There was therefore a direct representation made by the customer to the effect that the employee in question was authorised to verify the cheques. That is not the case here. TMW was not identified in any manner expressly by the customer to the bank as being authorised to verify cheques.

[74] It is also pertinent that in *Leolaris* (above) the cases of *Tai Soon Hing Cotton Mills Ltd v Liu Chong Hing Bank Ltd* (above) as well as *UAB v Tai Soon Heng Construction* (above) was not brought to the attention of the court.

[75] In all these circumstances I conclude that a defence of estoppel under the second limb of s 24 of the Act does not operate to alleviate the bank's liability for paying out on the forged cheques.

THIRD ISSUE: ON THE FACTS OF THIS CASE, DOES S 73A OF THE BILLS OF EXCHANGE ACT 1949 OPERATE TO AFFORD A DEFENCE TO THE BANK? IN OTHER WORDS, CAN IT BE SAID THAT THE CUSTOMER KNOWINGLY OR NEGLIGENTLY CONTRIBUTED TO THE FORGERY OR THE UNAUTHORISED SIGNATURE SUCH THAT IT OPERATES AND IS DEEMED TO BE THE SIGNATURE OF THE PERSON IT PURPORTS TO BE IN FAVOUR OF THE BANK WHO IN GOOD FAITH PAYS THE CHEQUE?

[76] The effect in law of s 73A of the Act has been discussed extensively above. I had concluded that the section does indeed statutorily alter or amend the position in common law to the extent that it provides a complete defence to any claim for monies from the paying institution or bank under a forged instrument where that same customer knowing that the instrument was forged, contributed to it, or negligently allowed the forgery to be perpetrated. To obtain statutory protection under s 73A of the Bills of Exchange Act 1949, the bank is obliged to adduce evidence to establish that it has acted in good faith and the customer has knowingly or negligently facilitated the forgery. The requirement to adduce such evidence has been highlighted and explained in *Leolaris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd* [2009] MLJU 854; [2009] 10 CLJ 234.

[77] In this context the onus of proving that a customer has knowingly or negligently contributed towards a forged or unauthorised signature rests solely with the bank. This is borne out by *Melewar Apex Sdn Bhd v Malayan Banking Bhd* [2007] 3 MLJ 687; [2007] 8 CLJ 579, where it was held that that before a bank could rely on the statutory protection provided under s 73A of the Bills of Exchange Act 1949, it had to show that the drawer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature.

[78] What then is the evidence, if any, of such 'negligent' contribution towards the forged or unauthorised signatures?

[79] Christina Ang confirmed in the course of her testimony that she was aware prior to the current claim that the bank was seeking verification of cheques from TMW. For example excerpts of her testimony in the course of cross-examination are as follows:

Q: One of your allegations is that the bank, UOB failed to follow standard

banker's guideline before honouring cheques. Would you expect UOB to make calls to the company in respect of every cheque that was issued?

A: Depends on the circumstances

Q: If there are discrepancies on the face of the cheques?

A: Yes

Q: Do you recall speaking to UOB on any cheque information before 10 February 2010?

A: With regards to letter of credit application, occasionally they will call me.

Q: With respect to cheques?

A: I cannot recall.

Q: You would agree that there would have been high value cheques between 1999 to 2010?

A: Yes

Q: Do you accept that MP had no problem on any cheques drawn?

A: Sometimes we would have to transfer the collection of funds from one company to another company. Therefore we had problems.

Q: MP never had a problem with respect to UOB honoring forged cheques?

A: No instances earlier than this forgery.

Q: In respect of other high value cheques, for UOB at some point before the claim there are high value cheques of RM50,000-00 but subsequently went up to RM100,000-00. *Are you aware that UOB was seeking clarification of those cheques from TMW?*

A: *Yes*

Q: Having got confirmation, cheques were cleared?

Yes A:

Q: No problem with those cheques thereafter?

A: Yes they are good cheques not to individuals

Q: *This would have gone on for at least a good part of 2007, 2008 entire 2009, when TMW says that It's good to go?*

A: *Yes*

Q: Late 2009, November 2009, and early December 2010, would you accept that there were no reasons for UOB to doubt the veracity of TMW when she says that the cheques were good to go?

A: No. They should not confirm with just party all the time. Bank should check if the signature is subject to bank's suspicion.

Q: Were you in the office on a regular basis in 2008-2010?

A: Yes

Q: Did you give your handphone number to UOB for authorization purposes?

A: I'm not sure.

Q: The only contact they had for the contact number is Malaysian Plastics, can you confirm this?

A: I don't think so

Q: When UOB calls MP, Siti Rokiah would answer the phone and she would pass the call to TMW, this was the usual mode over 2008-2010?

A: Yes

Q: You were aware of this?

A: Yes

Q: You didn't have a problem with TMW speaking to the bank giving necessary confirmations?

A: No. (Emphasis added.)

[80] And further on in the course of cross-examination:

Q: You suggest that there was unusual conduct of MP account from December 2009-Feb 2010 and you suggest that UOB should have taken this up. Is that one of your contentions?

A: Yes. I suggest that they should verify with the cheque signatories.

Q: Page 56, CBD4 for you to confirm. December 2009 account. RM450,000 at the middle. There were 2 other bigger cheques that were cleared without any problem. RM4.4 million and RM700,000-00

A: Yes

Q: Page 54, CBD4. November 2009. None of the cheques … but there were three large payments, RM120,000 on 10 November 2009, RM350,000 and RM 105,000, none of them impugned?

A: Yes

Q: Page 53, CBD4. October 2009. No impugned cheques? But you have 5 cheques exceeding RM100,000-00. 3rd entry, 4th entry, RM110,000-00 at the middle, RM400,000 and RM 185,000.

A: Yes

Q: Page 52, September 2009 statement. 2 big entires. None of them impugned? 2nd and 5th entry.

A: Yes

…

Q: Page 51, August 2009 statement 5 big entries. None of them impugned? RM1.2 million, RM800,000, RM320,000, RM600,000, RM300,000?

Yes A:

Q: The account has been in overdraft until about June/July 2009?

A: Yes

Q: Account started getting active in July 2009 when RM15.3 million was paid in respect of MP's sale of land and building?

A: Yes

Q: To look at the history of unusual transactions, one has to look at the period after the RM15.3 million came in because before that those were overdraft. Do you accept that?

A: You may look at the longer period before that as well, not just after the funds come in.

Q: I suggest to you that every month from August 2009- October 2009, there were withdrawal of sums in excess of RM100,000 without any problem, correct?

A: Yes

Q: There was no reason for the bank to be suspicious from November 2009- January 2010 because large clearances had taken place?

A: Disagree.

[81] Two facts emerge clearly from this testimony, namely that the customer's transactions involved the routine verification of large quantum cheques over a significant period of time between 2008 and 2010, more particularly between July 2009 and 2010. Most of these cheques, save for the eight forged cheques were verified correctly. All such verification had been done by TMW. More significantly such verification had been done by TMW with Christina Ang's, and therefore the customer's express consent and knowledge. In other words, although TMW was not an authorised signatory, Christina Ang had effectively authorised her to verify the customer's cheques with UOB. Put another way, Christina Ang, by her aforesaid conduct had acquiesced and implied to UOB by her conduct and series of dealings with the bank that she was prepared to hold out TMW as the person authorised to verify cheques on behalf of the customer.

[82] Apart from this, it also arose in the course of cross-examination and as highlighted at the outset of this case that TMW was in possession of and had full custody of all accounting matters in the customer. Christina Ang confirmed that she did not check the bank statements which were kept by TMW. Neither did she keep track of the cheque books which were also kept by TMW. All cheques to be issued were prepared under the supervision of, or by TMW. There was no countercheck in place to safeguard or check all this documentation relating to the movement of the customer's monies on any regular basis. TMW appeared to be accorded a free rein to deal with all matters pertaining to accounts, and most significantly in the preparation and issuance of cheques. This is what she said in the course of cross-examination:

Q: Did you go through all the bank statements with TMW every month?

A: No

Q: Did you go through with TMW every month on the cheque books?

A: No

Q: Do you agree that you didn't even bother to check with her on the bank statements and the cheque books because you trusted her so much so everything you leave to her?

A: Regarding cheque books and bank statements, yes.

[83] Christina Ang also advised that she had practiced pre-signing letter heads and left them in the care of TMW. However she denied pre-signing cheques. When it was then put to Christina Ang that there were no or minimal safeguard placed by the customer against fraud by a person such as TMW, she disagreed. She maintained that she was the authorised signatory who was available for verification, despite the fact that TMW was authorised with her knowledge and consent to liaise with the bank and had in fact done so successfully for some considerable time. She also stated further on in the course of her testimony that it was the bank that had assumed that TMW could confirm or verify cheques and that the customer had accorded the bank no such mandate.

[84] The net effect of the totality of the customer's evidence, primarily relevant and available through its principal director, Christina Ang, was that TMW was simply left to undertake the entire accounting function of the

customer with virtually none, or minimal, checking or auditing by the customer. There was no safeguard in place whatsoever to prevent fraud, albeit by a trusted employee. It appears to this court that the following factors are relevant in ascertaining whether s 73A comes into play in relation to whether there was a 'negligent' contribution to the fraud perpetrated by TMW:

(a) allowing or authorising TMW to verify cheques with UOB, notwithstanding that she is not an authorised signatory;

(b) allowing such authorisation over a significant period of time without any check or audit being undertaken to assess the customer's outgoings;

(c) omitting to peruse or study or check periodically the bank statements of UOB; and

(d) permitting TMW to have custody and possession of both the customer's bank statements and cheque books.

[85] The customer however maintains that it is not unusual for a company to leave its account matters in the hands of an accounts executive. That is the job TMW was hired to do. It did not however mean that TMW was in charge of the company per se, and it did not mean that she could authorise or verify all cheques from the customer. Prior to the forgery, it is pointed out, there was no reason for the company not to entrust matters into the hands of TMW. In addition to that, the customer maintains that the position in law is that there is no duty on a customer to supervise its staff/employees in such a way to prevent forgery by them.

[86] However under s 73A the issue is whether the customer contributed negligently to the facilitation of the fraud. That must be a question of fact in each case. On the facts of the current case, having considered the submissions of counsel for the customer and the bank, it appears that the customer did facilitate the forgery by, inter alia, allowing TMW full custody and control of all accounts documentation of the customer. This in conjunction with a failure to check or audit or supervise in any manner whatsoever the cheque books and bank statements contributed directly to the forgery. Finally the indirect authorisation of TMW in so far as the verification of the company's cheques was concerned comprised a combination of factors that falls within the purview of negligent contribution to the forgery as envisaged by s 73A. While the common law position imposes no duty on the customer to supervise its staff so as to prevent forgery by them, the statutory addition of s 73A requires the court to consider the entirety of the circumstances giving rise to the forgery and ascertaining whether the customer contributed knowingly or negligent to the forgery. The second requirement is that the court act in good faith.

A DID THE BANK ACT IN GOOD FAITH UNDER SECTION 73A?

[87] The customer contends that the bank failed to act in good faith in that it honoured the eight forged cheques. It is however evident from the evidence of all the bank's witnesses, particularly Atikah, DW13, that this was not done knowingly. In other words, there was no question of the bank's employees honouring the forged cheques despite knowing or suspecting that they were forged. Therefore it cannot be said that the bank did not act in good faith simply because it did not detect the forgeries. In fact it is evident from the contrasting evidence of the experts in this case that the forgeries were not easily detected. This contention therefore fails.

[88] It is also contended by the customer that the bank failed to act in good faith in that it failed to update the customer's mandate in that Ivan Ang's specimen signature was not uploaded onto the central cheque clearance system. The entire cheque clearance system employed by the bank was explained in detail by PW17, Suzana bt Selamat. In essence it was explained that when one of the bank's cheques is received by the collecting bank, it would scan the same and submit its image to Bank Negara Malaysia. Bank Negara Malaysia would then route the cheque image to the bank's central operations centre vide computer. Upon receipt of the cheque image the central operations centre would highlight certain issues such as the fact that the cheque is of high value or that technical issues have been detected or when the system cannot confirm the signature. At this point the officers in the central operations centre would verify the cheque image against the information available of the customer in the system.

[89] In the instant case, because Ivan Ang's signature as an authorised signatory was not uploaded into the central operations system computer, the customer's cheques, including the forged cheques were highlighted. At this point the central operations centre (largely DW13 in this case) referred the cheque to the respective branch for confirmation. The branch file would contain the updated specimen signatures, mandates and the like. The branch would then undertake the necessary verification and advise the central operations centre whether the cheque was good for clearance. It is at this point that several calls were made to the customer and rerouted to TMW deliberately, thereby allowing the forgery to continue undetected.

[90] The customer maintains that the bank's failure to upload Ivan Ang's signature between December 2009 to February 2010, notwithstanding that the customer's mandate was changed, as far back as 19 May 2009, meant that the bank had failed to act in good faith. It failed to abide by its own rules and regulations.

[91] I have considered this submission and am unable to accept the same as tenable. A perusal of s 73A makes it clear that the requirement of good faith must have a nexus with the payment out on the cheque. It envisages that the bank acted in accordance with prescribed procedure and with bona fides in honouring the cheque, such that it was in no way complicit in the act of forgery. In the instant case, the fault or omission of the bank was in its failure to update the specimen mandate lodged with the branch into its central operations centre computer. However the bank then on each occasion did refer the cheque back to the branch for verification and such verification or confirmation was carried out. If Ivan Ang's signature had been updated into the system, the cheque might not even have been verified unless it was also a high value cheque. In short the failure to update Ivan Ang's signature did not cause or contribute to the forgery in any manner whatsoever. The bank on each occasion did make a genuine attempt to verify the cheque. In these circumstances, I am satisfied that the bank acted in good faith. It might well be argued that the bank, by failing to insist on verification with an authorised signatory had breached its obligations, and therefore failed to act in good faith. However this would be a circuitous point. The fact that the bank had honoured a cheque which was forged through the fraud and forgery of an employee, led as discussed earlier, to the result that the bank was prima facie negligent or had failed to comply with its contractual obligations. Such a conclusion was reached as a consequence of the position at common law which imposes no further duties than the duty to exercise care in the drawing of a cheque, and to advise the bank upon discovering any act of forgery or fraud. However following from such a conclusion, by way of statutory intervention s 73A has provided a defence to the bank where there is evidence of negligent contribution to the forgery. Therefore the fact that the bank could have verified the signature with the authorised signatory is a relevant fact which contributes towards the conclusion that the bank was in fact prima facie negligent or failed in its contractual duty. However it then cannot be utilised once again in relation to s 73A so as to rebut the contention of 'good faith' and preclude the bank from relying on the defence. In fact the failure to verify with the authorised signatory was all a part of the fraud perpetrated by TMW to ensure that the forgeries would not come to light. However as there is no evidence to the effect that the bank was complicit with the perpetrators of the forgery, it cannot be said that they failed to act in 'good faith'. It would appear on a consideration of the totality of the circumstances therefore that the bank is not precluded from relying on this statutory defence on the facts of this case.

[92] Finally, the bank also pleaded that the customer breached the rules that governed its current account. In this context the bank produced two set of rules ie the 'rules governing current accounts' issued by Overseas Union Bank (Malaysia) Bhd ('OUB rules') and the 'current account rules' issued by UOB ('UOB rules'). The bank cited several rules from the UOB and OUB rules in

support of its position that it was expressly contracted with customer that they had to report any errors in their bank statement within a certain time, failing of which the customer would be liable.

[93] However, it became apparent in the course of the testimony of the various witnesses that the customer had first opened an account with OUB some twenty-five odd years ago. The present directors had no knowledge of the same. Neither had the current UOB rules been shown to have been expressly brought to the attention or knowledge of the current directors. In these circumstances the bank did not satisfy the requirement of having brought this fundamental contractual obligation to the notice of the customer. In order to rely on an exclusion clause of such a nature it is necessary for the Bank to establish that the precise nature and extent of the exclusion of liability was brought to the notice of the customer. As the bank could not establish this factually, the contention that the bank had expressly contracted to exclude its liability was not tenable.

CONCLUSION

[94] Based on all the evidence adduced in this matter, it appears to this court that although the customer has proven on a balance of probabilities that the disputed eight cheques were forged and although no defence is afforded to the bank by way of an estoppel under s 24 of the Bills of Exchange Act 1949, s 73A of the said Act has been established successfully as a statutory defence by the bank. Accordingly the customer's claim is dismissed.

[95] I now turn to consider the case of Malaysia Plastic Sdn Bhd and Manhattan Marketing Sdn Bhd v Malayan Banking Bhd in CS No D-22NCC-1579 of 2010 which was heard together with CS No D-22NCC-1467 of 2010 above.

CIVIL SUIT NO D-22NCC-1579 OF 2010

[96] This matter was heard in conjunction with the UOB case above. The plaintiffs bring this suit against the defendant in relation to thirty-seven cheques ('disputed cheques') and three letters of instruction for telegraphic transfers ('disputed LOIs') amounting to a total of RM4,269,228.97. The plaintiffs allege that these monies were wrongly paid out by the defendant as it had given no mandate to the defendant in respect of these transactions. In essence the same issues arise for consideration in this case as in the previous case, namely if forgery of the subject cheques and LOIs is established, who should bear the loss arising from such forgery in relation to the plaintiffs' current accounts — the defendant, Malayan Banking Bhd ('Maybank') or the

plaintiffs?

THE TRIAL

[97] As stated above the trial of this suit was heard together with KLHC Suit No D-22NCC-1467 of 2010, the UOB suit. The trial of both these suits took place over a period of five days and sixteen witnesses were called in respect of the Maybank suit. They included the following:

(a) PW1 — Christina Ang Ping Ping;

(b) PW2 — Ivan Ang;

(c) PW2 — Inspector Rafi bin Arifai;

(d) PW4 — Lim Yok Chaw;

(e) DW1 — Harcharan Singh s/o Tara Singh;

(f) DW2 — Mohd Tajudin bin Mohd Ali;

(g) DW3 — Chekar bin Deraman;

(h) DW4 — Mohd Raffi bin Harun;

(i) DW5 — Johari bin Samion;

(j) DW6 — Sivatharan Ayadurai;

(k) DW7 — Karen Lim Siok Yean;

(l) DW8 — Ismail bin Md Yatim;

(m) DW9 — Muhd Yunus bin Hamzah;

(n) DW10 — Norazah bt Ahamd;

(o) DW11 — Uvaletchmy a/p Arunasallam; and

(p) DW12 — Noor Azlan bin Sabar

SALIENT FACTS

[98] The background facts are comprehensively set out in the submissions by learned counsel for the plaintiffs, Malaysia Plastic Sdn Bhd and Manhattan Marketing Sdn Bhd ('the plaintiffs') and I adopt the same.

[99] The plaintiffs were customers of Maybank at all material times. The first plaintiff, Malayan Plastic Sdn Bhd ('MPSB') maintained a current account as did the second plaintiff, Manhattan Marketing Sdn Bhd ('MMSB'). The mandates of MPSB and MMSB for the operation of their respective accounts

were provided to Maybank. MPSB provided a Directors' Circular Resolution dated 7 October 1993 giving Maybank the mandate to accept cheques issued by any two out of four persons namely:

(a) Ang Guan Seng;

(b) Ang Pon Beng;

(c) Wong Aun Phui; and

(d) Ang Ping Ping or Christina Ang.

[100] Subsequently on 16 Janaury 2009 a second directors' Circular Resolution was extended to Maybank amending the mandate to allow any two out of three of the following persons to accept cheques, namely:

(a) Wong Aun Phui;

(b) Christina Ang; and

(c) Ivan Ang

[101] The amendment was necessary as one of the authorised signatories, Ang Guan Seng had passed away. The second plaintiff, MMSB on the other hand vide directors' Circular Resolution dated 24 April 1995 gave Maybank the mandate to accept cheques issued by any two out of the following four persons, namely:

(a) Ang Guan Seng;

(b) Ang Pon Beng;

(c) Wong Aun Phui; and/or

(d) Christina Ang

[102] Specimens of the signatures of all the said persons were obtained and set out in Maybank's specimen signature cards and kept at the bank. Between 11 August 2008 and 15 December 2009 a total of thirty-seven disputed cheques and three LOIs for telegraphic transfers were honoured and paid out of the plaintiffs' accounts without their knowledge or approval. With respect to MPSB, thirty-one cheques and one LOI were made out to three individuals. As for MMSB, it involved six cheques and two LOIs all made out to one individual and two companies.

[103] The particulars of the disputed cheques for both the plaintiffs are set out in tabular form below:

MPSB

NO.	Cheque Date	Cheque No.	Payee	Amount (RM)	Signatories
1.	10.8.2008	331897	Aliah	125,009.95	Christina Ang, Ivan Ang
2.	28.8.2008	331899	Aliah	98,901.96	Christina Ang, Ivan Ang
3.	8.10.2008	331898	Aliah	120,060.00	Christina Ang, Ivan Ang
4.	17.10.2008	331896	Aliah	155,368.20	Christina Ang, Ivan Ang
5.	14.11.2008	331900	Aliah	198,749.35	Christina Ang, Ivan Ang
6.	1.8.2009	899201	Kuan	38,100.00	Christina Ang, Ivan Ang
7.	4.8.2009	899202	Kuan	42,500.00	Christina Ang, Ivan Ang
8.	5.8.2009	899206	Aliah	48,000.00	Christina Ang, Ivan Ang
9.	10.8.2009	899208	Aliah	80,000.00	Christina Ang, Ivan Ang
10.	10.8.2009	899205	Kuan	85,600.00	Christina Ang, Ivan Ang
11.	14.8.2009	899213	Kuan	105,000.00	Christina Ang, Ivan Ang
12.	15.8.2009	899210	Kuan	128,056.00	Christina Ang, Ivan Ang
13.	16.8.2009	899212	Aliah	135,500.00	Christina Ang, Ivan Ang
14.	21.8.2009	899216	Kuan	135,500.00	Christina Ang, Ivan Ang
15.	1.9.2009	899217	Kuan	165,000.00	Christina Ang, Ivan Ang

16.	1.9.2009	899215	Aliah	155,009.00	Christina Ang, Ivan Ang
17.	23.9.2009	899219	Asbullah	80,000.00	Christina Ang, Ivan Ang
18.	28.9.2009	899220	Asbullah	75,000.00	Christina Ang, Ivan Ang
19.	29.9.2009	899221	Kuan	90,000.00	Christina Ang, Ivan Ang
20.	4.10.2009	899214	Kuan	85,000.00	Christina Ang, Ivan Ang
21.	6.10.2009	899230	Aliah	110,000.00	Christina Ang, Ivan Ang
22.	10.10.2009	899226	Kuan	159,885.00	Christina Ang, Ivan Ang
23.	16.10.2009	899224	Kuan	243,423.60	Christina Ang, Ivan Ang
24.	18.10.2009	899234	Kuan	135,000.00	Christina Ang, Ivan Ang
25.	26.10.2009	899225	Kuan	120,592.00	Christina Ang, Ivan Ang
26.	28.10.2009	899218	Aliah	69,000.00	Christina Ang, Ivan Ang
27.	1.11.2009	899227	Kuan	103,438.00	Christina Ang, Ivan Ang
28.	9.11.2009	899207	Asbullah	50,000.00	Christina Ang, Ivan Ang
29.	18.11.2009	899228	Aliah	82,442.20	Christina Ang, Ivan Ang
30.	1.12.2009	899222	Kuan	110,890.00	Christina Ang, Ivan Ang
31.	12.12.2009	899239	Kuan	350,000.00	Christina Ang, Ivan Ang

Disputed LOIs				
No	Letter date	Payee	Amount (RM)	Signatories
1	30.12.2008	Aliah	65,552.00	Christina Ang Ivan Ang
Total	**RM3,746,077.26**			

MMSB					
No	Cheque Date	Cheque No.	Payee	Amount (RM)	Signatories
1.	15.4.2008	G1755/169703	Aliah	32,631.00	Christina Ang Ivan Ang
2.	2.8.2008	170929	Aliah	73,529.95	Christina Ang Ivan Ang
3.	15.8.2008	170931	Aliah	45,000.00	Christina Ang Ivan Ang
4.	29.8.2008	170931	Aliah	88,898.00	Christina Ang Ivan Ang
5.	30.7.2008	170933	Aliah	45,000.00	Christina Ang Ivan Ang
6.	8.9.2008	170932	Aliah	92,832.55	Christina Ang Ivan Ang

Disputed LOIs				
No	Letter Date	Payee	Amount	
1.	7.11.2008	Motorcycle Sales Centre Corporation Sdn. Bhd.	90,005.60	Christina Ang Ivan Ang
2.	26.12.2008	Parlo Tours Sdn. Bhd	24,254.60	Christina Ang Ivan Ang
Total	RM523,151.70			

[104] The particulars of these cheques and LOIs reveal that they were made out between April 2008 and December 2009. The MMSB cheques however were all issued during 2008. The names of the signatories on those cheques are Christina Ang, Ang Guan Seng and Ivan Ang, who are all authorised signatories. Christina Ang and Ivan Ang deny signing these disputed cheques. Whether Ang Guan Seng could have even signed the disputed cheques is in issue as he became terminally ill and died on 19 October 2008.

MAYBANK'S CHEQUE CLEARANCE SYSTEM

[105] The process was explained by DW2 an officer from Maybank's Kuala

Lumpur Cheque Processing Centre ('KLCPC'). Again this portion of the evidence has been comprehensively set out in learned counsel for the plaintiff's extensive submissions and I adopt the same below.

[106] Once the cheques were banked into any bank an independent entity callsed Unisys Sdn Bhd would collect the cheques, scan them and sort them out according to the different banks. The scanned images of the cheques would then be burned into compact disc and sent to the respective banks. Maybank's cheques on their compact disc were sent to KPCPC, downloaded and distributed for clearance by the KLCPC officers.

[107] The KLCPC officers would examine the cheque images to ascertain the account number, check the current balance and if found to be sufficient, compare the cheque images with the specimen signatures in their system. If they matched, the cheque would be cleared. This is called the 'first layer' of protection. There is no reference back to the branch if any question arises in respect of the cheque, unlike the case with UOB. The KLCPC officers could, however look back at cheques dating back to the previous month for purposes of comparison and verification.

[108] For every cheque above RM20,000 the system generates a report called DGS24 which is then sent to the respective branch where the accounts for the cheque are maintained. The branch will then call the customer to verify the cheque. This is consonant with the bank's policy that the branch ahs to call the customer and not KLCPC. This verbal confirmation with the customer was described by DW5 as the 'second layer' of safeguard.

[109] It is relevant that by reason of a guideline set by Bank Negara, all cheques that are deposited prior to 4pm on a particular day, T-day, must be cleared or dishonoured by 1pm the following day, ie by T+1. Accordingly the DGA24 report is sent from KPCPC to the respective branch each morning on or by 7am and the branch officers there are tasked with contacting the customer to verify or confirm the cheque is good for clearance. Having done so, the have to revert to and notify the KLCPC officers before 1pm on T+1. Therefore all cheque confirmations have to be carried out within a short window of time, namely on the morning of T+1.

[110] The DGA24 report does not contain the cheque image but specifies the cheque number and amount. The payee is also not specified. In order to ascertain the payee's name the branch would have to call the KLCPC officers. It is not in dispute that confirmations or verifications were meant to be undertaken with the customers' authorised signatories.

[111] Five witnesses from KPCPC testified, namely DW2, DW3, DW4,

DW5 and DW12. Another eight witness statements were subsequently forwarded by Maybank midway through trial. As these witness statements were identical to those of the other witnesses called on behalf of Maybank in relation to the process by which the disputed cheques were cleared, parties agreed that the evidence of these additional eight witnesses would be treated in exactly the same way as that of the five witnesses above.

[112] DW2, DW3 and DW4 all testified that they verified different cheques and knew they had done so on the basis of Maybank's records. These records were not however produced in court. The plaintiffs submit that their evidence ought to be treated with little or no weight as they failed, apart from mere assertion, from producing any further evidence to corroborate the fact that they had indeed carried out the verification process. Having heard the witnesses however, it appears to this court that there was no reason for these witnesses to testify that they had verified the cheques when they had not. In other words, it is not possible to infer from the fact that they failed to produce Maybank's full records that these witnesses had not in fact carried out the verification process for some of the subject disputed cheques. It is not possible to conclude that they were lying simply because they failed to produce additional records. The fact of the matter is that these cheques were all cleared. The existence of a comprehensive system of cheque clearance in Maybank coupled with the evidence of these officers warrants the finding that on a balance of probabilities the disputed cheques were all put through the cheque clearance system and checked by these witnesses.

[113] The plaintiffs also complain that Maybank failed to prove that cheque verification had been performed in respect of ten of the disputed cheques. However Maybank did call a considerable number of officers from both KLCPC as well as the branch to explain their routine method of clearance of all cheques. There was no reason to suppose, given the existence of a well-established system of clearance, that such an exercise was not undertaken in respect of all the disputed cheques. Accordingly, notwithstanding that not every officer who cleared each disputed cheque was called it appears, once again on a balance of probabilities that these ten cheques were verified and cleared in much the same manner as the other disputed cheques.

[114] As explained above the second layer of protection required the branch to call the customer, ie the authorised signatory and obtain confirmation that the cheque was good for clearance. As was the case with UOB, and central to these two cases, Maybank's officers testified that when they called the plaintiffs they were routed to Tan Mei Wan and Siti Rokiah the receptionist. The plaintiffs maintain that this fact ought to be disregarded because it amounts to hearsay. The plaintiffs contend that Siti Rokiah ought to be called to prove this fact. The fact of the matter is that Maybank's branch officers testified that they

called the offices of the plaintiffs. That is direct evidence. They then testified that they were directed to TMW or Siti Rokiah. The fact that they were put through to TMW or Siti Rokiah also amounts to direct evidence of a fact in issue. These officers are of course not in a position to verify precisely who they spoke to who put them through to these individuals. In these circumstances the evidence of these witnesses is direct evidence of steps they took in the cheque confirmation process. They are giving evidence of steps they undertook personally and directly. This does not amount to hearsay.

[115] I therefore accept the evidence of the five witnesses called from the Maybank branch, namely Karen Lim Siok Yean, DW7, Ismail bin Md Yatim, DW8, Mohd Yunus bin Hamzah, DW9, Norazah bt Ahmad, DW10 and Uvaletchmy a/p Arunasallam, DW11 that they made the requisite calls to the plaintiffs' offices as required of them. These officers all referred to the DGA24 reports as proof that they called the customer in line with Maybank's policy of calling each customer for cheques exceeding RM20,000.

[116] For example, DW8 testified that he spoke to TMW because, he maintained his calls were always directed to the accounts department where he was made to understand TMW worked. It is contended by the plaintiffs that this amounts to hearsay and ought to be rejected. This submission does not appear to be well-founded because DW8 is again, describing what happened when he called the offices of MPSB or MMSB for cheque clearance. In any event the fact that he spoke to a person in the plaintiffs' offices and was then put through to another. Individual claiming to be the accounts executive TMW, is sufficient for this court to draw an inference that DW8 was put through to TMW when he called the plaintiffs' officers. That is the fact in issue and DW8's evidence, which is direct evidence establishes the fact that he spoke to TMW in respect of cheque confirmation.

[117] In the course of cross-examination, SD8 confirmed that under Maybank's policy he was required to speak to an authorised signatory but that he did not. He assumed that it was in order to deal with TMW who was the accounts representative. The other branch officers, namely DW9, DW10 and DW11 testified in much the same way. They were all put through to the accounts department, more specifically TMW or Siti Rokiah to verify or confirm the cheques. They testified that their respective verifications were recorded on the DGA24 reports. I accept that the notation on these DGA24 reports was an established system adopted by the Maybank branch officers to denote the fact that they had carried out the cheque confirmation exercise with the customer. In this case, as was the case with UOB, the lacuna lay in the fact that confirmation was undertaken with TMW rather than the authorised signatories. I accept the evidence of these witnesses as credible and truthful testimony. Their evidence remained essentially unimpeached throughout

cross-examination. This is because they conceded that they ought to have spoken to the authorised signatories but maintained that they were put through to TMW or Siti on all occasions. They had maintained so in the course of examination-in-chief as well.

[118] With respect to the LOIs, the clearance process was slightly different but also comprised the two layers of protection — namely the LOI verification in terms of a comparison of signatures and the second layer which would be the oral confirmation. There were no timelines to be complied with in respect of LOIs. DW7, Karen Lim testified that she verified the LOIs. DW7 testified that on one occasion she spoke to Christina Ang who instructed her to speak to Tan Mei Wan. However on other occasions it was TMW who verified the LOIs. SD7 admitted that speaking to a person other than the authorised signatory amounted to a breach of the bank's policy. She also testified that she asked for the other three signatories, namely Ivan Ang, Wong Aun Phui and Ang Guan Seng but they were never around. Based therefore on TMWs verification the LOIs were also cleared.

[119] The further particulars of the evidence tendered by all of Maybank's witnesses are set out in detail in the notes of proceedings as well as the plaintiff's summarised chronology of events. I do not propose to repeat the same here as these events deal with how each of the thirty-seven cheques and LOIs were verified by way of telephone by the various officers. Suffice to say that the modus operandi was the same, namely that the bank officers all maintained that upon calling the plaintiffs' offices they sought to speak to an authorised signatory but were put through to TMW (or on occasion Siti Rokiah), who confirmed the cheques.

[120] The fact of the erroneous or wrongful honouring of these disputed cheques was only discovered after the forgery in respect of the UOB cheques became apparent in or around 10 February 2010.

[121] The plaintiffs maintain that Maybank had no mandate to honour these disputed cheques and LOIs and such payment amounts to conversion to its own use or negligence in breaching its duty of care and/or breaching the contractual duty owed by Maybank to its customers. The plaintiffs therefore claim the sum of RM3,746,077.26 to be paid by Maybank to MPSB and a sum of RM523.151.70 to be paid by Maybank to MMSB, as well as damages and interest.

[122] By way of defence Maybank maintains that it did at all times comply with its code of practices in respect of its operation of the customers' accounts. While it does not deny honouring the disputed cheques and the LOIs, it

maintains that this was done following the instructions and mandates of MPSB and MMSB vide those cheques. It therefore denies negligence or conversion.

[123] Further Maybank maintains that it had contacted MPSB and MMSB to obtain confirmation in respect of the clearance of all cheques above RM20,000. Maybank points to the customers themselves and maintains that MPSB and MMSB had done nothing to audit or check or safeguard its systems. It also points to the fact that given the long period over which these disputed cheques were issued, MPSB and MMSB ought to have realised the loss of monies from their accounts. In essence they maintain as did UOB above, that the customers' negligence contributed to their loss.

THE ISSUES

[124] The issues that arise for consideration in this case are very much the same as in the UOB case and I therefore adopt the same questions here:

(a) were the signatures on the thirty-seven disputed cheques and LOIs forged?;

(b) if the disputed cheques are in fact forged, then on the facts of this case, is the second limb of s 24 of the Bills of Exchange Act 1949 operative, such that the plaintiff is precluded from setting up the forgery or want of authority?; and

(c) if the disputed cheques are in fact forged, on the facts of this case, does s 73A of the Bills of Exchange Act 1949 operate to afford a defence to the bank? In other words, can it be said that the customer knowingly or negligently contributed to the forgery or the unauthorised signature such that it operates and is deemed to be the signature of the person it purports to be in favour of the bank who in good faith pays the cheque?

FIRST ISSUE: WERE THE SIGNATURES ON THE THIRTY-SEVEN DISPUTED CHEQUES AND LOIS FORGED?

[125] More so than the UOB case, this issue was highly disputed by Maybank primarily because of the directly conflicting evidence of the two expert witnesses called on this issue. However apart from these two experts there was other relevant evidence which this court took into account as a whole in determining this issue.

[126] For the plaintiff, Christina Ang and Ivan Ang who are the sole surviving signatories, testified. Christina Ang's signature appeared on all of the documents. She clearly and decisively denied signing any of these documents

maintaining that they were forged. Ivan Ang whose signature appeared on twenty-six of the cheques also denied signing any of the cheques and maintained too that his signature had been forged. Ang Guan Seng appears to have signed eleven cheques and three LOIs. He could not be called as a witness as he died on 19 October 2008. Christina Ang testified that Ang Guan Seng was diagnosed with cancer sometime in late 2007 and had therefore stopped actively participating in the business since late 2007. It was therefore untenable that he could have signed the eleven cheques attributed to him. In this context, the plaintiffs submit, and there is no reason to disbelieve or disagree with their contention that he could not signed at least ten of the disputed cheques because they were issued when he was terminally ill and not in the office, some six months prior to his death. As for cheques and LOIs dated after 19 October 2008 it is beyond dispute that he could not have signed the same. This evidence affords a credible basis for concluding that the eleven cheques and three LOIs bearing his signature, were not drawn or signed by him.

THE HANDWRITING EXPERTS

[127] Mr Lim Yok Chaw testified for the plaintiffs while Mr Harcharan Singh s/o Tara Singh testified for the defendant. The plaintiffs challenge Mr Harcharan Singh's status as an expert on the basis that he did not receive full time formal training in document examination and handwriting identification, was not physically attached to the document section of JKM for training in handwriting identification and that as a director of forensics with JKM, he actually handled the administrative part rather than the actual document examination whilst in government service. However Mr Harcharan maintained that it was not necessary to undergo full time training in this field in order to qualify as an expert. Additionally he pointed out that he had been in charge of the documents section of JKM as director. In any event Mr Harcharan Singh's curriculum vitae bears out the fact that he has been involved in this field for some considerable time and has given evidence in court as an expert prior to this occasion. As he possesses the expertise and experience to testify on this subject, I accept that he is in fact a handwriting expert.

[128] Turning next to a comparison of the two experts' reports and testimony, the report and evidence of PW4, Mr Lim Yok Chaw is considered first. The contents of his report and that of the defendant's expert, Mr Harcharan Singh s/o Tara Singh, DW1 are comprehensively set out in his submissions and I adopt the same here.

THE PLAINTIFFS' EXPERT REPORT

[129] PW4 for the plaintiff submitted two reports called the signature verification report (for the Maybank case) and signature verification

supplementary report. The former dealt with thirty of the original disputed cheques while the latter dealt with the remaining seven original cheques and three original LOIs. Accordingly PW4 sighted the originals of all the disputed cheques and LOIs.

[130] PW4 explained that in conducting his examination he adopted the following method:

(a) he examined and compared the original copies of documents containing specimen signatures ('specimen documents') to check and ascertain whether they all showed similar handwriting characteristics;

(b) looking at these specimen documents he then established the range of variations, if any, to be found in the individual signatures, so as to obtain a master pattern for them;

(c) having established such a master pattern, he then proceeded to undertake a side by side comparison between the original copies of the disputed cheques and LOIs under magnification and suitable lighting. In so doing he utilised a binocular stereoscopic zoom microscope;

(d) PW4 also utilised a Sony digital camera to take photographs in his report to highlight the handwriting characteristics of the disputed signatures of Christina Ang in the disputed cheques; he also produced photographs to show the differences between the disputed signatures and the specimen signatures legitimately produced by Christina Ang; he undertook a similar exercise with Ivan Ang's signatures. The approach undertaken by PW4 is similar to that undertaken by UOB's expert witness, DW14; and

(e) PW4, Mr Lim, marked the disputed signatures of Christina Ang on the disputed cheques and disputed LOIs as 'Q1'–'Q40'. The true signatures of Christina Ang from the specimen documents were marked 'S1'–'S43'. The disputed signatures of Ivan Ang on the disputed cheques were marked 'D1' to 'D26' while the true signatures of Ivan Ang were marked 'R1' –'R44' in the specimen documents.

[131] PW4's conclusion with respect to Christina Ang's signature on the thirty original disputed cheques marked as 'Q1'–'Q30' was that they were traced forgeries and were of different authorship from the specimen signatures marked as 'S1'–'S43' on the specimen documents. He found the 'presence of indentation lines which ran parallel with or in close proximity of the inked strokes' in the disputed cheques. This he concluded was indicative of 'a method of tracing where unlinked indentation lines or marks were used as guidelines to be later inked in to generate the disputed signatures'. In his supplementary signature verification report which dealt with the remaining original seven disputed signatures on the cheques and three signatures on the LOIs, he again detected and noted indentations in the disputed signatures which were

positively indicative of traced forgeries. He concluded therefore that 'Q31'–'Q40' were of different authorship to the signatures on the specimen documents marked as 'S1'–'S43'.

[132] He made similar findings in respect of Ivan Ang's disputed signatures on twenty-five original disputed cheques. He found that the disputed signatures marked 'D1' to 'D25' were traced forgeries and of different authorship from the specimen signatures marked by PW — as 'R1'–'R44' on the specimen documents. His conclusions were similar in respect of Ivan Ang's signature on disputed cheques in the supplementary report.

[133] In summary therefore PW4 found that the disputed signatures of Christina Ang and Ivan Ang on the disputed cheques and disputed LOIs were not executed by them, but were traced forgeries. This conclusion was reached by reason of the presence of indentations running parallel or in close proximity to the inked strokes of the disputed signatures. The enlarged photographs of some of the disputed cheques showed the existence of these indentations.

THE DEFENDANT'S EXPERT REPORT

[134] DW1 prepared a report called the 'expert report on signature verification'dated 27 July 2011. His conclusions however were diametrically opposed to that of PW4. He concluded that all the disputed signatures of Christina Ang and Ivan Ang on the disputed cheques and LOIs enjoyed a common authorship with the specimen signatures or standards.

[135] In the course of his evidence, DW1 testified that he had examined the disputed cheques and disputed LOIs on 14 July 2011 at the office of the registrar of the magistrates court in Klang. It was only after he had examined the disputed signatures that he received specimen documents containing the standard or specimen signatures from Maybank on 15 July 2011. The trial of this matter was scheduled for 28 July 2011. DW1 therefore undertook a study of a substantive number of signatures, 254 signatures comprising 80 from the disputed cheques and LOIs and 173 specimen signatures within a short period of time.

[136] DW1 explained that he had examined the disputed signatures on the original disputed documents between 10am and 11.30am on 14 July 2011. He explained how he took various equipment to the registrar's office and set up an 'assembly line' whereby he would go through three stages in respect of each disputed signature. He would first make a 'first generation photocopy' of the disputed signature on his printer in colour; next he would examine each disputed signature under a ' binocular stereoscopic zoom microscope'; finally he would take microphotographs in colour with an SLR camera.

[137] It was put to DW1 in cross-examination that he had in fact examined eighty original impugned signatures within one and a half hours, to which he agreed. He did so moreover prior to having sighted the specimen signatures provided to him by the bank. In other words, the original disputed signatures were not compared on a side by side basis with the specimen signatures as was the case with PW4. The original disputed signatures and the specimen signatures were examined separately and at different times, although as explained by DW1 he took a colour photograph of the disputed signature away with him for such comparison purposes. It was put to him that a first generation photocopy in colour is not equivalent to the original disputed signature but DW1 disagreed that this was the case. It was suggested to DW1 that the most common and correct method of examining signatures is to examine the impugned signature and the standard signatures side by side, more particularly original disputed with original specimen. DW1 disagreed with this, maintaining that a microscope would not allow for the two cheques to be placed together side by side. When it was then put to him that having both the original impugned signatures and the original specimen signatures would allow them to be examined one after another under a microscope, DW1 maintained that this did not amount to a side by side comparison.

[138] It would appear that having the original disputed signatures available for immediate comparison with original specimen signatures allows for the most accurate comparison of the two sets of signatures, whether this is called 'side by side' comparison or otherwise. It allows for a close comparison of the original documents rather than a comparison between the original specimen signature and a photocopy of the original impugned signature. Clearly the former is preferable to the latter, if available.

[139] Next DW1 was questioned on the specimen signatures provided by Maybank and dating back to 1985. DW1 maintained that the signatures over the period of time from 1985 to the most recent specimens had not changed and that it fell 'within the bounds of natural variation'. He was however unaware of the extent of time over which these specimen signatures had been collected. DW1 confirmed that he did not ask Maybank for the dates of the specimen signatures. He was then pointed to a portion of his expert report where he had commented that he found the standards and impugned signatures to be roughly contemporary in time. As the impugned cheques were made between 2008 and 2009, while the standards or specimens dated over a far longer period of time, even as early as 1993, it was put to DW1 that contrary to his statement in his report the impugned signatures and the specimen or standard signatures were not in fact roughly contemporary. DW1 disagreed, although he had admitted earlier that he had not ascertained the dates on all the specimen signatures.

[140] DW1 was next referred to the specimen signatures of Christina Ang and then asked to compare several signatures before the court. It was put to him that a comparison of some of what had been marked as standard or specimen signatures by DW1 in fact disclosed different authorship. DW1 disagreed maintaining that this amounted to a natural variation.

[141] He was then asked whether, when given documents stated to be standards, he took any steps to ascertain that they were of common authorship. DW1 agreed that he had not seen the signatory sign the specimen signatures. It was then put to him that with respect to several of the specimens which DW1 had treated as standards, they were in fact written or executed by a different author. DW1 disagreed. Similarly a series of five signatures from those categorised as 'specimen' signatures by DW1 were compared and shown to exhibit substantive differences. DW1 disagreed in all instances.

[142] It was then put to DW1 that as he did not first examine the standards that were given to him and as he did not see the signatures being written in front of him, he had accepted certain samples which were tainted. As such his analysis of the specimen signatures having such a degree of variation, it was suggested was wholly inaccurate. DW1 disagreed.

[143] Finally a comparison was undertaken by learned counsel for the plaintiff between the signatures marked as specimens by DW1 and the impugned cheques. He was then shown a series of signatures which, it was put to him, were wholly different, but which DW1 had opined were of the same authorship. DW1 disagreed.

[144] It was also put to him that there was evidence of a 'pen lift'. DW1 maintained that it was 'skipping', not a pen lift.

[145] There was evidence of some anomaly in DW1's evidence. He had concluded that 'there is not an iota of evidence of: hesitation or tremor …'. However in another part of his report DW1 was shown that he had concluded that there was in fact 'hesitation' in the questioned signatures. He also admitted that there was a tremor in the disputed signatures of Christina Ang. He said 'for some of the impugned signatures there is very slight indication of tremor in the last horizontal line of the 'g' of 'Ang'. As such his conclusion that there was not an total of evidence of hesitation or tremor was unwarranted. DW1 however corrected this when it was pointed out and explained that he had plausibly cut and pasted this portion of the report from elsewhere.

[146] I have heard, considered and re-read the reports and evidence of the two experts who testified in this case. I have also considered the evidence of Christina Ang and Ivan Ang whom I found to be witnesses of truth and

credible. It appears to this court that the evidence of PW4, Mr Lim, is to be given greater weight and to be preferred over that of DW1, Mr Harcharan Singh for the following reasons:

(a) PW4 undertook a contemporaneous comparison of the original disputed signatures on the disputed cheques and LOIs and the original specimen signatures provided by Christina Ang and Ivan Ang. There was no dispute that their specimens were indeed provided by the latter. DW1 however did not undertake a side by side comparison but studied the original impugned signatures separately over a relatively short period of time (by reason of time constraints) and then utilised photocopies (albeit colour copies) to undertake the rest of his examination. Although photocopies can be used in such examinations, when the original is available and has been utilised in a side by side examination, it allows for greater accuracy to be undertaken in the comparison process;

(b) there was no examination, check and comparison of the specimen signatures themselves first. The issue therefore arose whether the specimen signatures themselves contained tainted signatures. If it is not ascertained with certainty that the specimen signatures are all definitely of common authorship, then there is room for error in any subsequent comparison exercise undertaken in comparing the impugned and specimen signatures. This is because there is a possibility that the so called 'specimen' signatures may comprise some of the impugned signatures. As such when compared with the original disputed signatures it might be erroneously concluded that there are similarities between the specimen and the original disputed signatures. For example DW1 utilised cheque No 899209 dated 17 August 2009 to LGP Optoelectronics Sdn Bhd as a specimen when it was a disputed signature. Christina Ang testified that she did not sign this cheque. Similarly DW1 utilised other documents where the signatures of Christina Ang are in fact disputed;

(c) as a consequence DW1's conclusion that there was a wide natural variation in the specimen signatures of Christina Ang and some natural variation in the signatures of Ivan Ang may not be accurate. He later on however also concludes that there is a 'wide natural variation' in both signatures. If the specimen signatures of Christina Ang and Ivan Ang are perused with the naked eye, it appears that there are quite considerable differences in the signatures which DW1 categorises as wide natural variation. It could however be due to the fact that they emanated from different authors. This possibility was not considered by DW1;

(d) an examination and comparison of the specimen signatures and the disputed signatures shows that there are clear differences between the two which are apparent to the naked eye. There were clear pen lifts in Ivan Ang's disputed signature as compared to the fluid and continuous one stroke seen in his original undisputed signature. Despite this, DW1

maintained that while a layman would consider these as differences, to an expert they were mere embellishments and would not amount to an indication of different authorship unless they were consistent, fundamental and significant. He stated that what an ordinary person can see and what an expert can see cannot be compared. However in reality, cheques are examined on a daily basis by laymen who and therefore it is relevant to note differences that are apparent to laymen;

(e) DW1 also maintained that the clear indentations apparent on the face of the original disputed cheques were actually 'shadows'. This contention is rejected as upon an examination of these cheques the indentations are clearly evident. DW1 further suggested that these indentations arose because the signature was written with some pressure and a hard nib on the first page which resulted in such indentation showing on the second sheet. However having examined the same, it appears to this court that the theory put forward by PW4 to the effect that the indentations were created with the intention to create an outline to be copied and the inked signature was largely attempting to following such indentations, appears preferable. This is because the inked signature attempts to follow the indentations as they were running parallel or in close proximity; and

(f) the evidence of Christina Ang and Ivan Ang remained wholly unimpeached notwithstanding cross-examination that stopped short of suggesting that Christina Ang had in fact signed these cheques herself or that she was complicity in such activity. There was absolutely no evidential basis for such suggestions. As such I accept wholly their evidence that they did not execute the signatures on all the impugned cheques and LOIs. This is one of the strongest factors in this court's conclusion that the thirty-seven disputed cheques and three LOIs were in fact forged.

[147] For these reasons, on the first issue, I conclude that the signatures on the thirty-seven disputed cheques and three LOIs were forged.

THE BANK'S LIABILITY AT COMMON LAW

[148] It follows from the finding of the court that the subject cheques were forged that Maybank has paid out on those thirty-seven cheques and LOIs without mandate from its customer and is therefore prima facie liable to the plaintiffs for the loss they have suffered. The basis for such a conclusion has been dealt with extensively in the UOB case above. I adopt entirely the case-law and reasoning applied in the UOB case to the present case as the fact scenario is almost identical to the present case.

SECOND ISSUE: IF THE DISPUTED CHEQUES ARE IN FACT FORGED, THEN ON THE FACTS OF THIS CASE, IS THE SECOND LIMB OF S 24 OF THE BILLS OF EXCHANGE ACT 1949 OPERATIVE, SUCH THAT THE PLAINTIFF IS PRECLUDED FROM SETTING UP THE FORGERY OR WANT OF AUTHORITY?

[149] The evidential position and position in law in relation to s 24 is identical to that of the UOB case. The methodology adopted by the plaintiffs in dealing with Maybank was essentially identical to that with UOB. This is evident from a perusal of the evidence of Christina Ang. Accordingly the issue of whether there was a clear representation from Christina Ang to Maybank with regards to the verification of cheques is to be answered in the same way. With Maybank as with UOB, it is evident that while Christina Ang allowed or acquiesced to TMW verifying and confirming cheques or LOIs, there was no express authorisation emanating from her or the plaintiffs to Maybank. Neither did Maybank confirm in writing its habit of verifying the cheques and LOIs with persons other than the authorised signatories whom they believed had been authorised to do so. Save for one instance involving Karen Lim who spoke to Christina Ang with respect to the verification of a LOI and was told to refer to TMW, there is no evidence, in my view of a positive representation made by the plaintiff to Maybank authorising them expressly to deal with TMW or Siti Rokiah in relation to the verification and confirmation of cheques. Accordingly save and except for that one LOI I find that no estoppel arises to preclude the plaintiffs' from making claim for the thirty-seven disputed cheques and two LOIs. In respect of the one LOI where Karen Lim maintains that she was asked by Christina Ang to speak to TMW, this issue was not specifically put to Christina Ang in the course of cross-examination (although as will be seen later, Christina Ang generally agreed that she allowed TMW to carry out confirmations with the banks). Accordingly it cannot be conclusively concluded on a balance of probabilities that an estoppel arises even in that one case. I adopt my reasoning as set out in relation to the UOB case, and find that no such estoppel arises.

THIRD ISSUE: IF THE DISPUTED CHEQUES ARE IN FACT FORGED, ON THE FACTS OF THIS CASE, DOES S 73A OF THE BILLS OF EXCHANGE ACT 1949 OPERATE TO AFFORD A DEFENCE TO THE BANK? IN OTHER WORDS, CAN IT BE SAID THAT THE CUSTOMER KNOWINGLY OR NEGLIGENTLY CONTRIBUTED TO THE FORGERY OR THE UNAUTHORISED SIGNATURE SUCH THAT IT OPERATES AND IS DEEMED TO BE THE SIGNATURE OF THE PERSON IT PURPORTS TO BE IN FAVOUR OF THE BANK WHO IN GOOD FAITH PAYS THE CHEQUE?

[150] The issue here, as was the case with UOB, is whether the bank is

afforded the statutory defence under s 73A by reason of any 'knowing or negligent contribution' to the forgery by the plaintiffs, provided Maybank at all times acted in good faith in paying out on those forged cheques. The construction that has been afforded to s 73A as having altered or amended the position at common law is borne out, inter alia, in the cases of *Trollimaster Sdn Bhd v RHB Bank Bhd* [2011] 7 CLJ 105 as well as *Prima Nova Sdn Bhd v Affin Bank Bhd* [2009] MLJU 1130; [2010] 9 CLJ 75.

[151] Again this issue is to be determined primarily by way of a consideration of Christina Ang's evidence as she was the director having direct charge of the accounts operations of the plaintiffs. Ivan Ang was based in Singapore and left matters largely to Christina Ang. As has been seen in the course of the discussion of Christina Ang's testimony in the UOB case, almost the entirety of the accounts operations and liaison with the bank was left to TMW. When cross-examined by learned counsel for Maybank, Christina Ang's testimony confirmed this position further. Christina Ang was referred to TMW's letter of employment and the scope of her duties and she confirmed that TMW did in fact carry out the full extent of the duties specified.

[152] Christina Ang confirmed that she trusted TMW entirely with the plaintiffs' cheque books and bank statements. She was also entrusted with making a full set of consolidated accounts. She also confirmed that TMW was authorised to speak to the banks although she initially denied that this was in relation to the confirmation of cheques. When it was put to her that TMW's role or duties included confirming the issuance of cheques and transfer of funds, she responded that it was the bank that had assumed this. Christina Ang pointed out that she had given an express mandate to the bank on whom to liaise with.

[153] Christina Ang was next taken through the system of work employed in the plaintiffs' offices in relation to financial matters. She confirmed that she signed approximately seven cheques a week in 2008 and less than that number in 2009 and 2010. She could not recall whether she might have signed one or two blank cheques in emergencies. She confirmed that there were cheques exceeding RM20,000 which were issued by the plaintiffs. It was put to her that there were many cheques exceeding RM20,000 between 2007 and 2010. Christina Ang could not recall this. She was then asked how many calls she had received from Maybank in respect of these cheques. She stated that she had not received any calls from Maybank. The relevant portion of the cross-examination is as follows:

Q: Did you find it strange when the bank did not call you for confirmation?

A: I am available for cheque verification because I am in the office but if the bank chooses to contact certain people then it's the expediency of the bank to contact such person.

Q: You are aware that the bank did call your office and talk to your accounts department to confirm the cheques?

A: I assume so. They must confirm with someone.

Q: You are aware that the bank did confirm with TMW on the issuance of your cheques?

A: You have a record to show this.

Q: Yes but I am asking you whether you are aware that the bank did confirm with TMW on the issuance of your cheques?

A: I am in the office everyday.

[154] And further on:

Q: You said that you were at your office everyday, are you aware that the bank called your office especially TMW to confirm the cheques?

A: Yes

Q: I put it to you that you have authorized TMW to confirm the cheques with banks?

A: I did not expressly authorize her to confirm issuance of cheques because I was present at the office.

Q: That was the reason why you did not complain to the bank why they did not call you with regards to the cheques?

A: No

Q: How often do you check your bank statements as in MP and MM?

A: Bank statements are kept by accounts department and I employed ace.

Department to do records and to do bank reconciliation. I delegate the duty of this job scope to the ace. Executive, TMW.

Q: You delegate the duty to TMW but you did not check what she was doing?

A: I check overall function.

Q: I am focusing on bank statements. You did not check?

A: No

Q: I put it to you that you are negligent as the Executive Director for not checking the bank statement of the accounts that you were running.

A: I disagree

[155] Further on in her cross-examination, Christina Ang confirmed that all bank statements and cheque books were left in the custody of TMW. TMW only came to her whenever there was a discrepancy. Otherwise there was no other means of check or safeguard employed by the plaintiffs, apart from periodic audits by third party auditors. She also confirmed that all access to the plaintiffs' cheque books was also through TMW who kept the keys. It was put to her that the plaintiffs relied too much on the accounts department. Christina Ang disagreed maintaining that the system had been utilised without any problems until the present forgery. It was put to her that she had by her conduct made Maybank believe that TMW had the requisite authorisation to verify cheques. Christina Ang disagreed. It was further put to her that the mode of management of the financial affairs of the plaintiffs was negligent, to which she disagreed. She was finally asked whether she had ever told TMW to stop confirming with the bank on the issuance of cheques. Her reply was that she didn't know.

[156] It is apparent from a reading of the entirety of the testimony of Christina Ang that the entire financial affairs of the plaintiffs was essentially relegated to TMW, as a trusted employee. She had custody of bank statements as well as all cheque books. As such she had unlimited access to these instruments which enabled her to utilise them to her own benefit. There was no check or safeguard in place to oversee or check on her work or the plaintiffs' accounts save for periodic audits. In short there was no system in place to inspect, examine or safeguard the financial affairs of the plaintiffs despite a large turnover of cheques and other financial instruments. In essence there was virtually no supervision or check undertaken by the plaintiffs vis a vis the accounts department. While it is clear from a consideration of the position in

common law that there is no duty on a customer to check his bank statements or take other such steps to check his balances on a monthly basis, the effect of s 73A, as has been discussed previously, is to ascertain whether there has been any 'negligent contribution' to the forgery. It is evident from the evidence read as a whole and the passages above that the effective accounting function was delegated almost entirely to TMW. There was no safeguard or check implemented on any form of periodic basis to ascertain the status of the plaintiffs' various accounts. It is also evident that Christina Ang, although knowing that TMW was verifying cheques on behalf of the plaintiffs with Maybank (and other banks) took no steps to stop such confirmation. In other words she knowingly acquiesced to TMW verifying cheques on behalf of the plaintiffs. Taken as a whole therefore, the reasonable inference to be drawn is that the plaintiffs, by failing to take any form of safeguards in respect of their accounts department had in fact negligently contributed to the forgery that transpired. There is no evidence before this court that suggests that Maybank acted otherwise than in good faith. Accordingly that proviso is also satisfied. As such, it appears to this court that the defendant has established its statutory defence under s 73A. Accordingly the plaintiffs' claim against Maybank is also dismissed.

Claims dismissed.

Reported by Ashok Kumar